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EDITOR'S NOTE

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une 6, 1985

Title: AT&T Technologies, Inc., Petitioner
v.
Communications Workers of America, et al.

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Lee, Rex E.

Counsel for respondent: Friedman, Irving Martin,
Gold, Laurence

ntry	Date	Note	Proceedings and Orders
1	Jun 6 1985	G	Petition for writ of certiorari filed.
2	Jul 11 1985		Brief of respondents Communication Workers of America, et al. in opposition filed.
3	Jul 15 1985		Reply brief of petitioner AT&T Technologies, Inc. filed.
4	Jul 17 1985		DISTRIBUTED. September 30, 1985
5	Oct 7 1985		Petition GRANTED.
			**********
6	Oct 31 1985		Record filed.
7	Oct 31 1985		Certified copy of original record on appeal & C.A. proceedings received.
8	Nov 21 1985		SET FOR ARGUMENT, Wednesday, January 22, 1986. (4th case).
9	Nov 21 1985		Brief amicus curiae of National Association of Manufacturers filed.
10	Nov 21 1985		Brief amicus curiae of Chamber of Commerce of the US filed.
11	Nov 21 1985		Joint appendix filed.
12	Nov 21 1985		Brief of petitioner AT&T Tech. filed.
13	Dec 9 1985		CIRCULATED.
14	Dec 23 1985	X	Brief of respondent Communication Workers of Amer. filed.
15	Dec 21 1985	X	Brief amicus curiae of Natl. Academy of Arbitrators filed.
16	Jan 14 1986	X	Reply brief of petitioner AT&T Technology filed.

PETITION FOR WRIT OF CERTIORARI

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ALEXANDER L. STEVAS,
CLERK

84-1913

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AT&T TECHNOLOGIES, INC.,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA
and its LOCAL 5090,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the fundamental principle of labor law that a party cannot be ordered to arbitrate a labor dispute *unless* a court first determines that the collective bargaining agreement mandates arbitration of the dispute (see *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 546-47 (1964); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)) can be subject to a broad "exception" in which the threshold question of arbitrability must be delegated to an arbitrator whenever it can be characterized as "involving" the merits of the dispute.

STATEMENT REQUIRED BY RULE 28.1

AT&T Technologies, Inc. is a wholly-owned subsidiary of American Telephone and Telegraph Company ("AT&T"). AT&T has no parent company. In addition to other wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; and ShareTech, Inc.

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OCTOBER TERM, 1984

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported *sub nom. Communications Workers of America* v. *Western Electric Company, Inc.*, 751 F.2d 203 (7th Cir. 1984),[1] and is reproduced in the Appendix to this Petition (1A-8A). The opinion of the district court is unreported and is reproduced in the Appendix (9A-11A).

[1] Western Electric Company, Inc. changed its name to AT&T Technologies, Inc. after this case was filed.

JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 1984. Petitioner filed a timely Petition for Rehearing on January 18, 1985, after the time for filing was extended by the Court of Appeals. The Petition was denied in an Order dated March 8, 1985, which is reproduced in the Appendix (13A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The following provisions of the Labor-Management Relations Act of 1947, 29 U.S.C. § 171, *et seq.*, are pertinent to this case:

Section 201(b):

> "It is the policy of the United States that—
>
> * * *
>
> (b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration . . . or by such methods as may be provided for in any applicable agreement for the settlement of disputes."

29 U.S.C. § 171(b).

Section 203(d):

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

29 U.S.C. § 173(d).

Section 301(a):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties."

29 U.S.C. § 185(a).

STATEMENT OF THE CASE

This case presents the recurring question of the proper role of a court in a suit to compel arbitration of a labor-management dispute under Section 301(a) of the Labor-Management Relations Act of 1947. Specifically, it raises the question whether arbitration can be ordered of fundamental business decisions that the employer had sought to exclude from arbitration — here, that "lack of work" justifies a layoff — in the *absence* of a prior judicial determination that the issue is arbitrable under the contract. The Seventh Circuit's resolution of this question conflicts with the decisions of the First, Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits and the earlier decisions of this Court.

Petitioner AT&T Technologies, Inc. ("the Company") and respondents Communications Workers of America and its Local 5090 ("the Union"), are parties to a national collective bargaining agreement which, at all times pertinent to this case, applied to the telephone equipment installation workers in twenty-six Locals. Article 8 of this collective bargaining agreement is an "arbitration clause" that provides for arbitration of disputes over the interpretation of the contract if, and only if, a dispute is not "excluded from arbitration by other provisions of this contract." See App. 2A, n.2. Article 9 of the agreement, in turn, is a broad management functions clause

that provides that decisions such as the termination of employment, which is defined to include layoffs (see Article 1.11), are the exclusive prerogative of management and are "not subject to the provisions of the arbitration clause" unless those management rights are limited by other provisions of the contract. See App. 3A, n.3. The relevant language of Article 8 and Article 9 has appeared in virtually identical form in each of the earlier agreements between the parties and was previously judicially construed to exclude the Company's termination decisions from arbitration. *In re Arbitration Between Western Electric Company, Inc. and Communications Workers of America,* 304 N.Y. 578, 107 N.E. 2d 76 (1952).

The only provision in the collective bargaining agreement that relates in any way to the management function of laying off workers is Article 20. It provides (¶ 3) that "when lack of work necessitates layoff, employees shall be laid-off in accordance with Term of Employment and by Layoff groups," thereby prescribing the order in which employees will be laid off in these events. See App. 2A, n.l. Article 20 further provides (¶ 5) remedies if employees are laid off in the improper order.

On September 17, 1981, the Union filed a grievance that challenged an earlier Company decision to lay off 79 workers from its Chicago base location. The *sole* basis for this grievance is that, in the Union's view, Article 20 prohibits any layoff of employees in a location "unless there is in fact a lack of work" in *that* location and the Union claimed that here "there was no lack of work at the Chicago, Illinois base location which justified a layoff" there. See R. 29, Plaintiff's Amended Complaint, para. 7; App. 2A. In this grievance, the Union expressly declined to challenge the Company's separate determination of the *order* in which installation workers were to

be laid off under Article 20, para. 3. R. 25 at 11-12.[2] When the Company refused to arbitrate this grievance on the ground that it is not arbitrable under the contract, the Union filed this action to compel arbitration in the District Court for the Northern District of Illinois.

In the District Court, both parties sought to litigate the question whether such sufficiency of work (and ensuing layoff) disputes had been excluded from arbitration by the contract. At the close of discovery, the Union and the Company each filed motions for summary judgment on this threshold question of arbitrability. The Company relied upon the exclusionary language of Article 8 and Article 9, the prior judicial interpretation of those provisions (see p. 4, *supra*), the subsequent bargaining history between the parties, and other "forceful evidence" of the parties' clear purpose to exclude all such claims from arbitration.[3] The Union, in turn, made arguments based on both the terms of Article 20 and other documentary evidence.[4]

---

[2] After filing the grievance, the Union filed five additional grievances protesting the permanent transfer into Illinois of various installation workers from Indiana and Wisconsin. See App. 2A. The Company agreed to arbitrate these grievances as they concerned only the *order* in which particular installation workers from Indiana, Wisconsin and Illinois were selected for transfer and layoff and involved different possible interpretations of Article 20, para. 3 of the agreement. R. 18, at 2-3; R. 24 at ¶¶ 18, 21.

[3] This evidence, which is undisputed in all material respects, traced the evolution of the pertinent contract provisions. The evidence included the Union's negotiating minutes concerning the contract provisions that had been previously judicially construed and the limited effect of subsequent contract changes. In addition, it is undisputed that deletion of the language of Article 9 excluding such disputes from arbitration was a perennial Union demand, and that no company decision to lay off workers had been arbitrated during the 30 years of contracts between the parties. See R. 33.

[4] At no time did either party present evidence on the question whether there was in fact sufficient work for the affected employees or

Footnote continued on following page.

The District Court, however, declined to rule on whether the grievance was arbitrable as a matter of law. Instead, it ordered the parties to submit the question whether this dispute was arbitrable to arbitration. The District Court reasoned that the Union's interpretation of the contract terms was at least "arguable" and that it was "for the arbitrator, not the court, to decide whether the union's interpretation has merit." App. 11A. Thus, although the Seventh Circuit's decisions require consideration of bargaining history and other "parole" evidence in ruling on issues of arbitrability,[5] the District Court did not consider the Company's evidence and simply delegated the issue of arbitrability to the arbitrator. App. 3A, 8A, 9A-11A.

The Seventh Circuit affirmed the District Court's order. The Court of Appeals recognized that the decisions of this Court establish "the general rule that the arbitrability issue is for the courts to decide unless otherwise stipulated by the parties." See App. 4A. However, the Seventh Circuit concluded that there should be an "important exception" to this rule where, as the court found to be the case here, "the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from arbitration, and deciding the [arbitrability] issue would entangle the Court in interpretation of substantive provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute." App. 7A.

Footnote continued from preceding page.

otherwise seek to litigate the merits of the dispute. All evidence presented was restricted to the issue of whether the Company was required to permit a labor arbitrator to review decisions that particular layoffs were justified by lack of work.

[5] See, *e.g.*, *Local 81, American Federation of Technical Engineers* v. *Western Electric Company, Inc.*, 508 F.2d 106, 108 (7th Cir. 1974); *Associated Milk Dealers* v. *Milk Drivers Union, Local 753*, 422 F.2d 546, 551 (7th Cir. 1970); *Independent Petroleum Workers* v. *American Oil Co.*, 324 F.2d 903, 907 (7th Cir. 1963), *aff'd*, 379 U.S. 130 (1964).

The Seventh Circuit reasoned that this "exception" is required by this Court's admonition that courts should not " 'determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements.' " App. 5A (citation omitted). In the Seventh Circuit's view, courts are therefore required to confine their determinations to the meaning of the standard arbitration clause and may not, in determining arbitrability, consider even the permissible range of meanings of a "broad exclusionary clause" (such as Article 9), other provisions of the agreement (such as Article 20), or other "forceful evidence" of the meaning of those provisions. App. 5A, 7A. The Seventh Circuit thus "ordered [the Company] to arbitrate the arbitrability issue." App. 8A.

The Seventh Circuit acknowledged that its exception to the "general rule" was "difficult to reconcile" with this Court's "discussion of a court's duty to decide arbitrability in [*John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 546-47 (1964)]." App. 6A. The Seventh Circuit asserted, however, that this discussion was "dicta" and that this Court reopened the issue in *Nolde Brothers, Inc.* v. *Local No. 358, Bakery Workers Union*, 430 U.S. 243, 255 n.8 (1977). See App. 6A.

REASONS FOR GRANTING THE WRIT

This case presents the question whether there can be an "exception" to the fundamental principle of national labor policy that a party cannot be judicially compelled to submit a labor dispute to binding arbitration unless a court first determines the threshold question whether the parties agreed to arbitrate that dispute. The Seventh Circuit's decision establishing this "exception" flatly conflicts with the decisions of this Court and those of the First, Second, Third, Fifth, Sixth,

Eighth, Ninth, Tenth, and District of Columbia Circuits.[6] Most fundamentally, the resolution, and elimination, of this conflict in this case is a matter of critical importance. Until reversed or set aside, the Seventh Circuit's decision will needlessly inhibit and complicate the negotiation and administration of innumerable national collective bargaining agreements.[7] This is especially so because the Seventh Circuit's "exception" is, by its terms, applicable to all or virtually all existing national collective bargaining agreements and disputes over arbitrability under them — and would swallow the "general rule".

I. The Seventh Circuit's Decision Conflicts With The Prior Decisions Of This Court And The Pertinent Decisions Of Other Courts Of Appeals.

Under Section 301(a) of the Labor-Management Relations Act's mandate to develop a body of federal law to govern the enforcement of collective bargaining agreements, this Court and courts of appeals have held that national labor policy prohibits a federal court from ordering arbitration of *any* labor grievance unless a court first independently determines that the reluctant party agreed, in the collective bargaining agreement, "to arbitrate the grievance" and to give the arbitrator the "power" to enter an award. *United Steelworkers* v. *Warrior &*

[6] The only court of appeals that has not rejected the Seventh Circuit's approach is the Fourth Circuit. See *A.S. Abell Company* v. *Baltimore Typographical Union No. 12*, 338 F.2d 190, 195 (4th Cir. 1964).

[7] These considerations, moreover, are especially acute because the Seventh Circuit's broad "exception" is now a settled part of the law of that circuit. The exception was hinted at in two earlier Seventh Circuit decisions (see App. 5A-6A), and was recently expressly reaffirmed. See *Jones Dairy Farm* v. *Local No. P-1236, United Food & Comm. Workers Union*, 119 Lab. Rel. Ref. Man. 2185 (BNA) (No. 84-1301, 7th Cir., April 24, 1985) (slip op. at 2-5).

Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). This principle rests on the plain terms of Section 301(a), which "assigned the *courts* the duty of determining whether the reluctant party has breached his promise to arbitrate," and on the principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id. Accord, United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 571 (1960) (Brennan, J., concurring) (same). *See also Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), *overruled in part on other grounds, Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) ("whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties"); *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U.S. 254, 256 (1962) (same).

This Court reiterated these principles in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), where the Court relied on the holdings of *Warrior & Gulf* and its progeny to decide that a successor employer could resist arbitration on the ground that it was not a party to a labor agreement:

> The problem in [*Atkinson, Warrior & Gulf* and *American Manufacturing*] was whether an employer, concededly party to and bound by a contract which contained an arbitration provision, had agreed to arbitrate disputes of a particular kind. Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision. *The reason requiring the courts to determine the issue is the same in both situations. The duty to arbitrate being of a contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective*

> *bargaining agreement does in fact create such a duty.* Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, *it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.*

376 U.S. at 547 (emphasis supplied). Far from being dicta (compare App. 6A), this language reaffirmed the unmistakable holdings of *Warrior & Gulf* and *Atkinson* and the explicit congressional policies. Those holdings, in turn, have been reiterated in this Court's subsequent decisions. *E.g., International Union of Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374-75 (1974).[8]

This Court's decisions also make it explicit that the Seventh Circuit is mistaken that courts may not determine arbitrability when it depends on interpretations of a "broad exclusionary clause" or other provisions of collective bargaining agreements. Compare App. 5A, 7A. To be sure, this Court has cautioned lower courts to avoid entanglement in the *merits* of a dispute when deciding an issue of arbitrability and that there is a "presumption of arbitrability." See *Warrior & Gulf*, 363 U.S. at 583, 585. However, this Court has never taken the position that lower courts should refuse to interpret provisions that bear directly on a determination of arbitrability and that the "presumption" of arbitrability is *pro tanto* irrebuttable. On the contrary, *Warrior & Gulf directs* federal courts to determine whether there is an "express provision" of the contract that

[8] Nor was the issue "reopened" in *Nolde Brothers, Inc.* v. *Local No. 358, Bakery Workers Union*, 430 U.S. 243 (1977). Compare App. 6A. There, the Court stated only that "[c]ertiorari was neither sought, nor granted, on the question of the arbitrator's authority to consider arbitrability following referral, and we express no view on that matter." 430 U.S. at 255 n.8.

"exclud[es] a dispute" from arbitration and to assess any other "forceful evidence of a purpose to exclude the claim from arbitration." *Id.* at 584-85. Such determinations are impossible unless the federal courts consider "broad exclusionary clauses" and any other pertinent provisions of the collective bargaining agreement that are relevant to the parties' intention to arbitrate a dispute. "Questions of arbitrability" cannot be "automatically resolved . . . in the union's favor by asserting the existence of a dispute" over the meaning of such provisions; courts must look behind conclusory claims of arbitrable disputes. See *Trailways of New England, Inc.* v. *Amalgamated Ass'n.*, 353 F.2d 180, 182 (1st Cir. 1965).

For these reasons, an "exception" under which courts may not rule on arbitrability whenever it is deemed to "involve the merits" cannot be administered without swallowing up the "general rule." Indeed, *any* decision on arbitrability involves the merits in the sense that a holding that a dispute is not arbitrable is tantamount to rejecting the claimant's grievance. As succinctly stated by the Ninth Circuit in *Pacific Northwest Bell Telephone Co.* v. *Communications Workers of America*, 310 F.2d 244, 248 (9th Cir. 1962), with whose holding and rationale the Seventh Circuit decision is in stark conflict:

> The problem . . . is whether the question of arbitrability can be reached by the court without trespassing upon the forbidden ground of the merits.

The Ninth Circuit resolved this question as follows:

> There can be little doubt that in cases such as *Warrior* and the case at bar a determination upon the merits will affect the question of arbitrability and vice versa. But we do not apprehend that this almost inevitable interlocking of issues results in ousting the courts from any inquiry beyond the bare written words themselves.

Id. at 248. Eight other circuits have agreed with the Ninth Circuit and disagreed with the Seventh Circuit. See pp. 13-14, nn. 10-11, *infra.*

The Ninth Circuit is right, and the Seventh Circuit is wrong. Any "inevitable interlocking" between the merits and arbitrability cannot mean that courts are "oust[ed] . . . from any inquiry" into arbitrability. *Pacific Northwest Bell Telephone Co.*, 310 F.2d at 248. It means only that courts must be careful to avoid unduly restrictive interpretations of contract terms in ruling on arbitrability and confine their consideration to the question whether exclusionary clauses and other "forceful evidence" of intent establish that there is no basis for finding that there is a legitimate contract dispute that the parties intended an arbitrator to resolve.[9]

The Seventh Circuit's further holding (App. 7A) that parties can be deemed to have agreed to arbitrate the threshold issue of arbitrability whenever *that* issue is not "clearly excluded . . . from arbitration" does even greater violence to the purposes of the labor laws and the principles established by this Court. It injects a new condition into the bargaining relation that expressly was *not* agreed to by the parties, contrary to the clear congressional mandate that courts must only give effect to the method "*agreed* upon by the parties" for resolution of

[9] This Court has engaged in these very inquiries into substantive contract terms and their purposes in analogous contexts. See *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 708-10 (1983) (considering bargaining history and prior arbitration decisions to determine whether parties agreed to waive statutory rights to strike); *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 492-94, 499-500 (1979) (analyzing bargaining history to shed light on scope of mandatory bargaining requirement); *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 221-22 (1979) (finding that the "[i]nescapable conclusion to be drawn from . . . bargaining history" relied upon to interpret contract language is that the union is not liable for damages under Section 301(a) for wildcat strike). *See generally United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960) ("special heed should be given to the context in which the collective bargaining agreements are negotiated and the purpose they are intended to serve").

disputes. See §§ 201(b), 203(d) of the Labor-Management Relation Act of 1947. To permit other methods to be imposed on the parties "by judicial implication" subverts the congressional policy and, indeed, inevitably will inhibit collective bargaining. *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 221-22 (1979); see *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960).

Thus, other courts of appeals have uniformly held the question whether a grievance is arbitrable is a threshold question that must be decided by the court as a matter of law and have *ordered* the very judicial determinations that the Seventh Circuit held to be improper.[10] These courts of appeals have held that courts must interpret or consider the very kinds of "broad exclusionary clauses" *(e.g.* Article 9) and other provisions of collective bargaining agreements (*e.g.* Article 20) that the Seventh Circuit refused to interpret. See, *e.g.*, *International Union, UAW* v. *General Electric Co.*, 474 F.2d 1172, 1176-77 (6th Cir. 1973); cases cited in n.10, *supra*. They have further held that courts must, in determining arbitrability, assess any other "forceful evidence of a purpose to exclude the claim from arbitration," including the very kind of "parole"

[10] See, *e.g.*, *Painters, Local 558* v. *Lord & Burnham Constr. Corp.*, 705 F.2d 998, 1000 (8th Cir. 1983) (per curiam) (holding courts "must" determine arbitrability and reversing district court order compelling arbitration where no finding expressly made); *California Trucking Ass'n* v. *Teamsters, Local 70*, 679 F.2d 1275, 1281 n.5 (9th Cir. 1981), *cert. denied*, 459 U.S. 970 (1982) ("unless parties have *explicitly* agreed to the contrary, it is a matter for the courts, not the arbitrator, to decide whether the parties have agreed to submit specific issues to arbitration") (emphasis in original); *accord, Westinghouse Federation of Independent Salaried Unions* v. *Westinghouse Electric Corp.*, 736 F.2d 896, 902-03 (3d Cir. 1984); *Westinghouse Broadcasting Co.* v. *Stage Employees, Local 804*, 616 F.2d 97, 99-100 (3d Cir. 1980); *Mobil Oil Corp.* v. *OCAW, Local 8-766*, 600 F.2d 322, 324-25 (1st Cir. 1979); *Carpenters Dist. Council of Denver* v. *Brady Corp.*, 513 F.2d 1, 3-4 (10th Cir. 1975); *Blake Constr. Co.* v. *Laborers' Int'l Union*, 511 F.2d 324, 327 (D.C. Cir. 1975); *Strauss* v. *Silvercup Bakers, Inc.*, 353 F.2d 555, 558-59 (2d Cir. 1965). *See also* cases cited in n.11 *infra*.

evidence of bargaining history, prior judicial opinions, and the like that the Company relied on below.[11] In short, although the reluctant party has the burden of demonstrating that a dispute has been excluded from arbitration, the decisions of this Court and other courts of appeals squarely reject the Seventh Circuit's conclusion that the threshold issue of arbitrability can *ever* be delegated to an arbitrator. It is a question of law for the court. Thus, although the conflict in rationales is most vividly spelled out in the Ninth Circuit's decision in *Pacific Northwest Bell, supra,* 310 F.2d at 248, it is quite clear that the specific question decided by the Seventh Circuit of the proper function of a court in determining arbitrability would, on these facts, have been decided differently in any one of nine other circuits.

II. Prompt Resolution Of This Conflict Is A Matter Of Great National Importance.

Finally, not only is there a fundamental conflict on the question presented here, but the prompt resolution of the

[11] See, *e.g., Communications Workers of America* v. *Pacific Northwest Bell Telephone Co.,* 337 F.2d 455, 459 (9th Cir. 1964) ("very nature of a collective bargaining agreement requires that it be read in light of bargaining history" and rejecting "technical rule of evidence which would render incompetent parol evidence of a party's intent;" *Warrior & Gulf* recognizes "that if evidence of intent is of the 'most forceful' character, it need *not* be confined to the language of the contract") (emphasis in original); *California Trucking Ass'n* v. *Teamsters, Local 70,* 679 F.2d 1275, 1281 & n.5 (9th Cir. 1981) ("parole evidence and evidence of bargaining history are relevant and admissible on the issue of arbitrability"); *accord, International Brotherhood of Electrical Workers* v. *Western Electric Company, Inc.,* 661 F.2d 514, 516 (5th Cir. 1981); *Kansas City Royals Baseball Corp.* v. *Major League Baseball Players Ass'n,* 532 F.2d 615, 622-29 (8th Cir. 1976); *International Union, UAW* v. *General Electric Co.,* 474 F.2d 1172, 1173-76 (6th Cir. 1973); *Pacific Northwest Bell Telephone Co.* v. *Communications Workers of America,* 310 F.2d 244, 248 (9th Cir. 1962); *International Union, UAW* v. *Cardwell Mfg. Co.,* 304 F.2d 801, 802-03 (10th Cir. 1962).

conflict is a matter of great national importance. The reason is that the "exception" that the Seventh Circuit has established has profound and *immediate* implications for both the administration of existing national collective bargaining agreements and the negotiation of new ones.

The Seventh Circuit's new rule can apply to countless agreements. Indeed, it appears that the "exception" established by the Seventh Circuit swallows the general rule, for the exception would apply to the collective bargaining agreements at issue in *all* the decisions discussed in Part I of this petition (pp. 8-14, *supra*). In each of these decisions, it appears that (1) the agreement contained a "standard arbitration clause," (2) the parties had "not clearly excluded the arbitrability issue from arbitration" (but had relied on the "general rule" that courts alone could decide arbitrability), and (3) the decision on arbitrability required some "interpretation of substantive provisions of the agreement." Compare App. 7A.

But, under any view, the Seventh Circuit decision can profoundly complicate the administration of innumerable *existing* national agreements. It will mean that the fundamental decisions on arbitrability under *national* agreements can be governed by different standards, depending on where disputes arise and are raised, creating opportunities and incentives for forum shopping and other attempts to broaden the class of arbitrable disputes in countless circumstances. Further, until reversed, the decision will needlessly complicate and inhibit negotiation of new collective bargaining agreements in the Seventh Circuit and elsewhere.

Most significantly, this Court can end this potential confusion and disruption without significantly burdening its docket. Because the Seventh Circuit's decision so clearly misapprehends settled principles, it would be entirely appropriate for the Court to vacate the decision of the Seventh Circuit and remand for an independent judicial determination of the threshold question whether the September 17, 1981 grievance is arbitrable, on the authority of *Warrior & Gulf, supra,* and its numerous progeny.

CONCLUSION

For the reasons stated, this Court should grant the petition for certiorari, summarily vacate the Seventh Circuit's decision, and remand for judicial determination of whether the grievance at issue is arbitrable. Alternatively, the Court should grant the petition and give the case plenary consideration.

Respectfully submitted.

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APPENDIX

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U.S. COURTS

In the

United States Court of Appeals

For the Seventh Circuit

751 F.2d 203

No. 83-3236

COMMUNICATIONS WORKERS OF AMERICA and its LOCAL 5090,

Plaintiff-Appellee,

v.

WESTERN ELECTRIC COMPANY, INC.,*

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 772—John F. Grady, *Judge.*

ARGUED SEPTEMBER 18, 1984
—DECIDED DECEMBER 26, 1984

Before WOOD, *Circuit Judge,* SWYGERT, *Senior Circuit Judge,* and GRANT, *Senior District Judge.***

WOOD, *Circuit Judge.* This appeal raises yet again, but in a different context, the question of the proper role for a court to play in deciding whether a dispute between an employee and employer is arbitrable under the terms of a collective bargaining agreement.

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* Following the inception of this litigation Western Electric changed its name to AT&T Technologies, Inc.

** The Honorable Robert A. Grant of the Northern District of Indiana, sitting by designation.

I.

Defendant-Appellant, Western Electric (the "Company"), appeals from a district court order compelling it to arbitrate, under a collective bargaining agreement (the "Agreement"), a grievance filed by Plaintiff-Appellee, Communications Workers of America and its Local 5090 (the "Union"), challenging the September 25, 1981 layoff of 79 Illinois-based installers.

On September 17, 1981, the Union grieved the Company's announced intention to lay off 79 installers from its Chicago base location. The Union asserted that there was no lack of work at the Chicago location and that the layoff was therefore not justified under the terms of the Agreement. Specifically, the Union claimed that under the "Adjustments to the Working Force" clause (Article 20)[1] the Company can lay off only employees assigned to the base location where the lack of work exists. Notwithstanding the grievance, the Company laid off the Chicago employees on September 25, 1981 and soon thereafter transferred approximately 80 employees from Indiana and Wisconsin base locations to Chicago.

The Union then demanded arbitration of the dispute pursuant to the Arbitration clause of the Agreement (Article 8).[2] The Company refused to arbitrate, claiming

[1] Art. 20 [Adjustments to the Working Force]: "3. When lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Term of Employment and [,] Layoff groups as set forth in the following: [subparagraphs stating order of layoff]."

[2] Art. 8 [Arbitration]: "If the National [Union] and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator."

that the "Management Functions" clause (Article 9)[3] gives it the unilateral right to lay off employees when it determines a lack of work exists in its facilities so long as it lays them off in the order prescribed by Article 20 of the Agreement.

The Union then sought the intervention of a court to compel arbitration pursuant to section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a)(1982). The parties submitted several affidavits and took several depositions concerning the parties' intention regarding arbitrability of the dispute. Without reference to this parol evidence the district court found that the Union's interpretation of the Arbitration clause and other pertinent provisions was "arguable" and that there was no "express provision excluding a particular grievance from arbitration" or "forceful evidence of a purpose to exclude the claim from arbitration." Accordingly the court ordered arbitration of the arbitrability issue.[4]

We affirm.

[3] Art. 9 [Management Functions]: "The Union recognizes that the rights of the Company (subject to the limitations contained in the provisions of this Contract, but otherwise not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of the work."

[4] Although there is some ambiguity as to whether the district court ordered arbitration of the dispute itself, or arbitration of the arbitrability issue, we think the latter is the fairer reading of the order.

II.

The Company argues on appeal that the district court erred in giving the arbitability issue to the arbitrator rather than deciding the issue itself.

In support of its argument the Company quotes the following language from *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960):

> § 301 of the Labor Management Relations Act . . . assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

The Company also quotes from *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) as follows: " 'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.' " *Id.* at 546-47 (quoting *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962)). Finally, the Company quotes the following language from this circuit's *Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753*, 422 F.2d 546 (7th Cir. 1964) decision: "The district court must determine whether the dispute between the parties is arbitrable . . . unless the parties voluntarily submit arbitrability to the arbitrator." *Id.* at 550 (citing *Warrior & Gulf*).

The above quoted language establishes the general rule that the arbitrability issue is for the courts to decide unless otherwise stipulated by the parties. However, the holdings and other language contained in these and subsequent cases suggest that the rule is subject to an important exception: where deciding arbitrability would entangle a court in the construction of substantive provisions of a labor agreement. *See* Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The*

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Emerging Federal Law, 63 Mich. L. Rev. 751, 784 (1964) (arguing that Supreme Court cases up through 1964 suggest this exception to the rule that a court must decide arbitrability). In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 585, the Court admonished courts to "view with suspicion an attempt to persuade [them] to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator." In a companion case, *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), the Court explained its admonition against becoming involved in the merits: "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." *Id.* at 569.

This circuit has heeded the *Warrior & Gulf* admonition. In *Associated Milk Dealers*, in the course of remanding the case to the district court for a more detailed consideration and definitive decision of the arbitrability issue, this court took pains to distinguish between the case being considered there, where deciding arbitrability is "limited" and "particular," and one where deciding arbitrability requires the court "to interpret a broad exclusionary clause (*e.g.*, concerning management's right to contract out or to discharge employees), which inevitably involves consideration of the merits of the dispute." *Id.* at 552. In the former a court should decide arbitrability; in the latter it should not.

Several cases in this circuit have adhered to the *Associated Milk Dealers* distinction. In *Local 156, United Packinghouse, Food and Allied Workers v. Du Quoin Packing Co.*, 337 F.2d 419 (7th Cir. 1964), we ordered arbitration, under a standard arbitration clause, of Union claims regarding reinstatement and transfer of employees which "arguably . . ., not necessarily as conclusively, [was] within coverage" of the arbitration clause. We

refused to decide the arbitrability issue definitively because resolution would have involved delving into the merits of the claim. Similarly, in *Local 703, International Brotherhood of Teamsters v. Kennicott Bros.*, 725 F.2d 1088 (7th Cir. 1984), we ordered arbitration without definitively deciding arbitrability where the Union's "claim itself purport[ed] to be based on an interpretation of an integral clause of the contract, vis, whether 'bouquet makers' are 'packers, wrappers, stockmen or general warehouse help' " within the terms of the Agreement. *See also Local 344 Leather Goods, Plastics & Novelty Workers' Union v. Singer*, 478 F. Supp. 441, 444 n.6 (N.D. Ill. 1981) ("[T]his Court's task is not to discover whether the parties intended to submit this question to arbitration but rather, whether the collective bargaining agreement is susceptible of an interpretation that the dispute is arbitrable."); *International Brotherhood of Electrical Workers, Local 134 v. Chicago Zone of the Marketing Operations of the General Electric Co.*, 535 F.Supp. 16 (N.D. Ill. 1981) (to similar effect); *Cf. Randall v. Lodge No. 1076, International Association*, 648 F.2d 462 (7th Cir. 1981) (court should not allow a party to use issues of the arbitrator's authority as a ruse to obtain judicial review on the merits of an arbitral award).

Although the exception discussed above is difficult to reconcile with the Supreme Court's discussion of a court's duty to decide arbitrability in *Wiley* (quoted above), that discussion was dicta. The question in *Wiley* was whether the arbitration rights under the collective bargaining agreement survived a corporate merger. Deciding that issue did not involve consideration of the merits of the grievances which concerned employee "vested" rights such as seniority status, severance pay, etc. Moreover, to the extent the Court decided the issue in *Wiley*, it reopened the issue in *Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 255 n.8 (1977), where it expressly reserved the issue of an arbitrator's authority to consider arbitrability following referral from a court under section 301 of the Labor Management Relations Act.

The weight of the authority supports the rule that a court should compel arbitration of the arbitrability issue where the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from arbitration, and deciding the issue would entangle the court in interpretation of substantive provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute.

In this case Article 8 is a standard arbitration clause, providing for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder." Furthermore, there is no clear, unambiguous exclusion from arbitration of terminations predicated by a lack of work determination. Rather, there are colorable arguments both for and against exclusion, both of which require interpretations of less than clear *substantive* provisions. The Company claims that Article 9, the "Management Functions" clause, excludes from arbitration its decision to terminate employees. The Union counters that Article 20, the "Adjustments to the Working Force" clause, limits the "Management Functions" clause: that it makes arbitrable the issue of whether there really is a lack of work predicating layoffs at the base location where the layoffs occur and that the Company breached Article 20 of the Agreement when it laid off employees from a base location where no lack of work existed. The Company retorts that Article 20 only sets forth the order of layoffs, not the circumstances under which layoffs can occur. Clearly to decide whether this dispute is arbitrable would require a court to interpret not only the Arbitration clause (a task clearly within its province), but also several substantive provisions of the Agreement: the "Management Functions" clause and the "Adjustments to the Working Force" clause. Since the Agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from arbitration, and to decide arbi-

No. 83-3236

trability would require interpretation of substantive provisions of the Agreement, we decline the invitation to decide arbitrability.

Since determining arbitrability would enmesh a court in the merits of this dispute, the district court properly avoided consideration of the extensive parol evidence regarding bargaining history and prior litigation between the parties. This evidence goes to the merits of the dispute, decision of which is for the arbitrator. *See Local 703, International Brotherhood of Teamsters v. Kennicot Bros.*, 725 F.2d at 1091.

The order of the district court is therefore AFFIRMED; the Company is ordered to arbitrate the arbitrability issue.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—12-28-84—450

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

COMMUNICATIONS WORKERS OF AMERICA, et al., *Plaintiffs,* v. WESTERN ELECTRIC COMPANY, INC., *Defendant.*	No. 82 C 772

ORDER

Pending before the court are cross motions for summary judgment. We grant plaintiffs' motion and deny defendant's.

The amended complaint alleges that defendant laid off a number of workers on the premise that there was a lack of work. The complaint alleges that there actually was not a lack of work and that therefore the layoffs were in violation of the collective bargaining agreement. Plaintiffs filed a grievance and sought to invoke the contract's arbitration clause but defendant refused to arbitrate the grievance. This suit is brought to compel defendant to arbitrate the grievance.

The relevant contractual provisions are as follows. Article 8, which is the arbitration clause, provides:

> If the National [plaintiffs] and the Company [defendant] fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator . . . .

Article 9, which is the management rights clause, provides:

> The Union recognized the rights of the Company (subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of the work.

Article 20, entitled "Adjustments to the Working Force," requires that defendant follow a certain order in laying off employees "[w]hen lack of work necessitates layoff."

Under these provisions, where there is a disagreement over the interpretation of the contract, the matter must be arbitrated unless the dispute is excluded from arbitration by some provision of the contract. Article 9 does exclude certain management rights from the scope of arbitration, but that exclusion is itself made subject to any limitations on management rights found elsewhere in the contract. Article 20 is a limitation on management rights; the question is whether it is a limitation on what management did in this case. Plaintiffs interpret Article 20 to require that there be an actual lack of work prior to employee layoffs and argue that there was no such lack of work in this case. Under plaintiffs' interpretation, Article 20 would allow the union to take to arbitration the threshold issue of whether the layoffs were justified by a lack of work. Defendant interprets Article 20 as merely providing a sequence for any layoffs which management, in its exclusive judgment, determines are necessary. Under defendant's interpretation, Article 20 would not allow for an arbitrator to decide whether the layoffs were warranted by a lack of work but only whether the company followed the proper order in laying off the employees.

Whatever our view of the merits of each side's argument, there is clearly a genuine dispute over the meaning of Article

20, and, accordingly, of Articles 8 and 9. That dispute should be settled through arbitration unless the contract contains an "express provision excluding a particular grievance from arbitration" or there is "forceful evidence of a purpose to exclude the claim from arbitration." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960). As long as the question is "arguable," arbitration should go forward. *Packinghouse Workers v. DuQuoin Co.*, 337 F.2d 419 (7th Cir. 1964). Here, the union's interpretation of Article 20 is at least "arguable." Therefore, it is for the arbitrator, not the court, to decide whether the union's interpretation has merit.

Accordingly, we grant plaintiffs' motion for summary judgment and deny defendant's motion. Defendant is ordered to arbitrate the grievance.

DATED: November 18, 1983

ENTER: /s/ JOHN F. GRADY
United States District Judge

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

COMMUNICATIONS WORKERS OF AMERICA, et al., *Plaintiffs,* v. WESTERN ELECTRIC COMPANY, INC., *Defendant.*	No. 82 C 772

JUDGMENT ORDER

This cause came on to be heard on cross motions for summary judgment, and the court having considered the pleadings in the action, and having found that there is no genuine issue of material fact to be tried, and having concluded that plaintiffs are entitled to a judgment as a matter of law, it is hereby

ORDERED AND ADJUDGED that the motion of plaintiffs for summary judgment is in all respects granted, and judgment is entered herein in favor of plaintiffs and against defendant.

IT IS FURTHER ORDERED that defendant arbitrate the grievance.

DATED: November 18, 1983

ENTER: /s/ JOHN F. GRADY
United States District Judge

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

March 8, 1985

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

COMMUNICATIONS WORKERS OF AMERICA and its LOCAL 5090, *Plaintiff-Appellee,* No. 83-3236 vs. WESTERN ELECTRIC COMPANY, INC.,** *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 82 C 772 John F. Grady, *Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellant Western Electric Company, Inc., on January 18, 1985, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

** Following the inception of this litigation Western Electric changed its name to AT&T Technologies, Inc.

OPPOSITION

BRIEF

(2)

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 84-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AT&T TECHNOLOGIES, INC.,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA
and its LOCAL 5090,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION

Whether the Seventh Circuit in affirming the order of the District Court properly determined that Respondent's grievance was arbitrable.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AT&T TECHNOLOGIES, INC.,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA and its LOCAL 5090,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Seventh Circuit's summary of the facts is both succinct and accurate. We shall highlight the facts as necessary.

The collective bargaining agreement between Respondent Unions, Communications Workers of America and its Local 5090 ("CWA"), and Petitioner, AT&T Technologies, Inc., contains a standard management rights clause (App. 3A, n.3). The contract also contains a broad arbitration clause which requires that "... *any differences* arising with respect to the interpretation of this contract ..." shall be resolved by arbitration. (Emphasis added)

The grievance at issue involves the layoff of 79 Chicago based installers who were covered by the collective bargaining agreement, followed by the immediate forced transfer into Chicago of 80 installers from Indiana and Wisconsin to fill the artificially created vacancies. CWA grieved the layoff of the Chicago installers as violative of Article 20, Paragraph 3, which in relevant part provides:

> "3. When lack of work necessitates Layoff, Employees shall be Laid-Off by (seniority) and by . . .
>
> 3.1 [Base Location]."

In its grievance, CWA contended that there was no lack of work at the Chicago base location as required by Article 20, Paragraph 3, but that the lack of work existed in two other base locations, i.e., Indiana or Wisconsin, which were also covered by the collective bargaining agreement. Therefore, the layoffs should have occurred in Indiana or Wisconsin, rather than in Chicago. Both the Seventh Circuit and the District Court (App. 3A, 11A) found that the CWA's interpretation was at least "arguable". Under *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960), this is all that was required.

Petitioner contended that the grievance was non-arbitrable by reason of the management rights clause. That boilerplate management rights clause itself, however, contained the significant proviso that all such management rights expressly are made *"subject to the limitations . . . of the Contract."* In addition, both lower courts found that the contract failed to contain either an "express provision" or other "forceful evidence" of intent to exclude Article 20 grievances from arbitration. (App. 3A, 11A)

Both the District Court and the Seventh Circuit concluded that a determination of the ultimate arbitrability of the grievance required a substantive interpretation of Article 20 of the

contract in order to decide whether Petitioner is precluded by Article 20 from laying off employees from a base location where there is no lack of work. Both courts below recognized that this question presented a threshold determination as to the underlying merits of the grievance, as well as implicating the scope of the arbitration and management rights provisions (Article 8 and 9 respectively) which are involved in the issue of arbitrability.

Since Petitioner's claim of non-arbitrability directly implicated the ultimate merits of the grievance, the Seventh Circuit determined that the issues, including that of arbitrability, must necessarily be resolved through the contractually mandated arbitration procedures. Both the District Court and the Seventh Circuit declined Petitioner's invitation to become enmeshed in the merits.[1]

ARGUMENT—REASONS WHY THE WRIT SHOULD BE DENIED

This case is unworthy of the Court's attention. The Petition for a Writ of Certiorari should be denied.

No principle is more firmly embedded in our national labor policy than that of judicial noninterference in the substantive interpretation of collective bargaining agreements which provide for dispute resolution through arbitration. For the past quarter century, the *Steelworkers* trilogy and its progeny have established an unwavering adherence to the principle that it is not the function of the courts to become enmeshed in the merits of the myriad of disputes which arise out of the "law of the shop" as embodied in collective bargaining agreements. *United*

[1] Neither the District Court nor the Seventh Circuit found it necessary to resolve the disputed bargaining history (some of which purported to deal with events occurring 30-35 years earlier) and other disputed evidence offered by both parties, holding that CWA's interpretation of Article 20 was certainly "arguable."

Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). To enmesh the judiciary in the substantive merits of such disputes would open the floodgates of litigation to employers who could thwart and delay the grievance procedure merely by relying on boilerplate management rights clauses as a pretext for refusing to arbitrate grievances. This case is squarely controlled by the *Steelworkers* trilogy.

The Seventh Circuit properly analyzed the grievance under the well-established principles set forth in *Steelworkers v. American Mfg. Co., supra,* and *Steelworkers v. Warrior & Gulf Navigation Co., supra.* Clearly, Grievance No. 16-66-7 is genuine and arose within the four corners of the contract. Finding neither a clear nor an implied contractual expression of intent to exclude Article 20 disputes, such as this, from arbitration, the Seventh Circuit's decision to compel arbitration was thus preordained by the *Steelworkers* trilogy.

The Seventh Circuit declined to resolve the merits of this grievance. It properly determined that a substantive ruling on the merits of Petitioner's claim that this grievance was non-arbitrable necessarily would have enmeshed the District Court in resolving the substantive merits of the dispute, a matter, of course, for an arbitrator under this contract. It declined Petitioner's invitation "to determine the merits of a grievance under the guise of interpreting the grievance procedure" (*Steelworkers v. American Mfg. Co.*, 363 U.S. at 569) and properly "view(ed) with suspicion" Petitioner's attempt to have the court "become entangled in the substantive provision of a labor agreement" under the guise of determining arbitrability. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 585. (See App. 3A)

Thus, the Seventh Circuit affirmed the District Court's order compelling arbitration. This result is mandated by the

Steelworkers trilogy. Any other result would have entangled the courts in a full arbitration-like hearing on the substantive merits of the grievance, a result at odds with the national labor policy eschewing judicial involvement in contract disputes.

Petitioner's contention that this case involves "a matter of great national importance" (Pet., pp. 14-15) appears overblown. The result below was mandated by the *Steelworkers* trilogy, which is hardly a matter of unsettled law. The Seventh Circuit, in declining to make an ultimate merits determination of the arbitrability question, merely acted to enable both parties to present their arguments to the contractually mandated arbitrator on the intertwined issues of Article 20 (layoffs) and Article 9 (management rights), unhampered by a prior judicial determination of the merits of each of the respective positions.[2] In compelling arbitration, the Seventh Circuit affirmed the unambiguous finding of the District Court that the CWA's interpretation of the substantive meaning of Article 20 was certainly "arguable" (App. 3A, 11A). With this finding, the courts' duty of inquiry ends and that of the arbitrator begins. *Steelworkers v. Warrior & Gulf Navigation Co., supra.*

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[2] The Fifth Circuit has recently reached a similar result. *Local 4-23 Oil Chemical & Atomic Workers v. American Petrofina Co.*, (5th Cir.), No. 84-2322, May 6, 1985.

CONCLUSION

The Petition presents an unremarkable case under 29 U.S.C. Section 185. Accordingly, there is no basis for granting the Writ.

Respectfully submitted,

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July 8, 1985

REPLY BRIEF

No. 84-1913

(3)

Office-Supreme Court, U.S.
FILED
JUL 15 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AT&T TECHNOLOGIES, INC.,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA
and its LOCAL 5090,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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* Petitioner's Statement Required by Rule 28.1 appears at page ii of the Petition.

IN THE

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AT&T TECHNOLOGIES, INC.,

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COMMUNICATIONS WORKERS OF AMERICA
and its LOCAL 5090,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

Despite its attempt to confuse the basic issue presented in the Petition for Certiorari, Respondents' Opposition vividly confirms the need for Supreme Court review of the "important exception" that the Seventh Circuit has created to long-established principles of federal labor policy. The very propositions that the Opposition accepts establish the importance of this Court's resolution of the conceded conflicts among the courts of appeals.

First, it is undisputed that the Seventh Circuit has established a major "exception" to labor law principles that is "difficult," if not impossible, to reconcile with this Court's prior decisions. See App. 4A-6A. Respondents appear to agree with the Seventh Circuit that the "general rule" that is required by national labor policy and that was established in *Warrior & Gulf*,[1] *Wiley*,[2] and their progeny is that arbitration cannot be

---

[1] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-82 (1960).

[2] *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964).

ordered of any labor controversy unless a court first independently determines that the parties agreed to arbitrate it in their collective bargaining agreement and did not intend to exclude such controversies from arbitration. App. 4A. Respondents also do not dispute that the Seventh Circuit did not follow the "general rule" here, but instead established an "important exception" in which this threshold question of arbitrability is to be submitted to binding arbitration whenever it can be deemed to "involve the merits of the dispute."[3] *Id.* 4A, 6A-8A. Nor do Respondents disagree with the Seventh Circuit's acknowledgment that this exception is "difficult to reconcile with the Supreme Court's discussion of a court's duty to decide arbitrability in *Wiley*" and its precursors. *Id.* 6A.

Further, Respondents concede the enormous practical importance of the "exception" that the Seventh Circuit established. Respondents do not deny that an exception in which courts may not rule on arbitrability whenever it is deemed to "involve the merits" would swallow up the general rule,[4] for

[3] Respondents admit (p. 3 n.1) that the Seventh Circuit did not decide whether the arbitration clause, the prior judicial interpretation of the clause, and other undisputed "forceful evidence" of the parties' intentions established that the fundamental management decisions of determining the need for layoffs had here been excluded from review by arbitrators. Indeed, after the Seventh Circuit acknowledged that there are "colorable arguments both for and against exclusion" of the grievance at issue from arbitration, it expressly declined even to address them or otherwise "to decide arbitrability;" its reason was that such a decision would "involve consideration of the merits of the dispute." App. 7A-8A.

Against this background, Respondents' suggestion, elsewhere in their Opposition (p. 4), that the Seventh Circuit found that there was no "contractual expression of intent to exclude Article 20 disputes" from arbitration is inexplicable; the Seventh Circuit expressly declined to decide all such issues.

[4] Respondents' suggestion (Opp. p. 5) that a judicial determination of arbitrability here "would have entangled the court in a full arbitration-like hearing on the substantive merits of the grievances" is

(Footnote continued on next page.)

any decision on arbitrability "involves the merits" in some sense. See Petn. pp. 10-11. As the Ninth Circuit stated, under *Warrior & Gulf*, it is "inevitable" that a "determination upon the merits will affect the question of arbitrability and vice versa," and the Seventh Circuit's approach would result "in ousting the courts" from their duty to decide the analytically separate question of whether parties intended to submit particular disputes to binding arbitration. *Pacific Northwest Bell Telephone Co.* v. *Communications Workers of America*, 310 F.2d 244, 248 (1962); see Petn. pp. 10-12.

Most fundamentally, Respondents do not dispute the Seventh Circuit's new rule conflicts with the decisions of at least *eight* other circuits. Indeed, Respondents' only real response to the Petition on this score is to suggest that a recent decision indicates that the Fifth Circuit may now be following the Seventh Circuit's new exception.[5] But, if true, the fact that an additional circuit may have joined the Seventh Circuit (and the Fourth Circuit) in rejecting the rule that this Court and the other eight circuits have followed *accentuates* the need for a prompt resolution of the conflict in this case. This is especially so because, as Respondents (Opp. pp. 4-5), the Seventh Circuit (App. 1A), and Petitioner (Petn. p. 15) all agree, disputes over the arbitrability of fundamental management decisions arise with great frequency, and conflicting decisions in the circuits thus present enormous potential for disruption of the administration and negotiation of collective bargaining agreements. See Petn. p. 15.

(Footnote continued from preceding page.)

nonsense. The substantive issue in any arbitration here would be whether there was in fact insufficient work and whether this, under the contract, justified a layoff. *None* of these issues need be addressed or resolved to decide whether the dispute is arbitrable. Indeed, both the CWA and the Company litigated the threshold question of arbitrability below *without* even presenting any evidence on the merits of the dispute. See Petn. pp. 5-6 n.4.

[5] Opposition, p. 5 n.2, citing *Oil Chemical & Atomic Workers Int'l Union Local No. 4-23* v. *American Petrofina Co. of Texas*, 759 F.2d 512, 515 (5th Cir. 1985).

Against this background, it is not surprising that the Respondents' Opposition is devoted almost exclusively to its arguments that, even if an improper legal standard was adopted, the Seventh Circuit reached the correct result for the wrong reasons. Specifically, the Respondents state (erroneously) that the Seventh Circuit "found" that the CWA's interpretation of the pertinent substantive provisions of the contract was an "arguable" one,[6] and Respondents claim, on this basis, that an arbitration order "was thus preordained by the *Steelworkers* triology." Opp. p. 4. Respondents have here confused two separate propositions. Respondents are correct that questions of contract interpretation are presumptively for the arbitrator if a union's interpretation is arguable, but this rule applies *only if* the parties did not intend to exclude such contract disputes from arbitration.[7] In all events, the latter, threshold question of arbitrability is for a court to decide independently and, in doing so, it must consider the kind of "forceful evidence" of an intent to exclude the matter from arbitration that the Company presented and that the lower courts here refused to assess. Compare Petn. pp. 4-5 & n.3 *with* Opp. p. 3 n.1.

---

[6] The court of appeals made no such finding. On the contrary, its discussion of the contract terms was expressly limited to the different question of the arguments for and against *exclusion* of this dispute from arbitration (App. 7A)—which the Court declined to resolve. The language that the Opposition quotes (App. p. 4) is the Seventh Circuit's summary of the district court's findings. See App. 3A.

[7] In a similar vein, Respondents (Opp. p. 1) erroneously state that the Collective Bargaining Agreement here makes all "differences" in contract interpretation arbitrable and *ignores* that some such disputes involving management functions are expressly excluded from arbitration by the terms of the contract. See Petn. p. 3; App. 2A, n.2.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for Certiorari, the Court should grant the petition, summarily vacate the Seventh's Circuit decision and remand for a judicial determination of whether the grievance at issue has been excluded from arbitration. Alternatively, the Court should grant the petition and give the case plenary consideration.

Respectfully submitted,

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July 15, 1985

JOINT

APPENDIX

Supreme Court, U.S.
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No. 84-1913

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1985

AT&T TECHNOLOGIES, INC.,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA and its LOCAL 5090,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 6, 1985
CERTIORARI GRANTED OCTOBER 7, 1985

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Date	Record No.	Proceedings
February 9, 1982	1	Complaint in Case No. 82 C 0772, U.S. District Court for the Northern District of Illinois filed
February 10, 1982	6	Defendant's Motion to Dismiss filed
February 10, 1982	7	Answer of Defendant Western Electric Company filed
February 10, 1982	12	Plaintiffs' Motion for Temporary Restraining Order filed
February 10, 1982	17	Order of District Court scheduling hearing on Plaintiffs' Motion for Temporary Restraining Order for February 12, 1982
February 12, 1982	22	Hearing held on Plaintiffs' Motion for Temporary Restraining Order; Order entered by District Court denying Plaintiffs' Motion
March 12, 1982	25	Transcript of proceedings before District Court on February 12, 1982 filed
July 7, 1982	29	Plaintiffs' Amended Complaint filed
July 21, 1982	31	Affidavit of Erwin J. Callaghan filed
July 21, 1982	32	Defendant's Answer to Amended Complaint filed
July 21, 1982	33	Defendant's Motion for Summary Judgment and Memorandum in Support filed

Date	Record No.	Proceedings
August 25, 1982	34	Plaintiffs' Motion to Take Discovery and to Hold Briefing Schedule on Defendant's Motion for Summary Judgment in Abeyance filed
August 25, 1982	35	Plaintiffs' Notice of Deposition of Erwin J. Callaghan filed
September 8, 1982	37	Order of District Court allowing Plaintiffs leave to take discovery entered
October 15, 1982	38	Defendant's Response to Plaintiffs' First Request for Production of Documents filed
November 9, 1982	39	Deposition of Erwin J. Callaghan filed
January 13, 1983	42	Plaintiffs' Cross Motion for Summary Judgment filed
January 13, 1983	43	Plaintiffs' Memorandum in Support of Cross-Motion for Summary Judgment filed
January 13, 1983	44	Affidavit of John Smykowski, II filed
February 16, 1983	48	Defendant's Motion to Take Discovery and Temporarily Hold in Abeyance Briefing Schedule on Cross-Motions for Summary Judgment filed
February 16, 1983	49	District Court enters order granting Defendant's Motion to Take Discovery

Date	Record No.	Proceedings
February 22, 1983	50	Defendant's First Request for Production of Documents filed
February 22, 1983	51	Defendant's Notice of Deposition of Raymond Murray, Philip Padgett and John Smykowski filed
May 16, 1983	55	Deposition of Phil C. Padgett filed
May 16, 1983	56	Deposition of John Andrew Robert Smykowski filed
May 16, 1983	57	Deposition of Raymond J. Murray filed
May 16, 1983	58	Original documents admitted as exhibits for Depositions of Padgett, Murray and Smykowski filed
May 16, 1983	59	Defendant's Reply Memorandum in Support of its Motion for Summary Judgment filed
August 10, 1983	61	Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment filed
November 18, 1983	64	District Court enters Memorandum Opinion and Order granting Plaintiffs' Motion for Summary Judgment and denying Defendant's Motion for Summary Judgment
November 18, 1983	65	Judgment Order entered by District Court on Memorandum Opinion
December 7, 1983	66	Defendant's Motion to Stay Injunction Pending Appeal filed
December 7, 1983	67	District Court enters order allowing Defendant's Motion to Stay Injunction Pending Appeal filed

Date	Record No.	Proceedings
December 16, 1983	68	Defendant's Notice of Appeal filed
February 24, 1984		Defendant's Main Brief to Seventh Circuit Court of Appeals filed
April 10, 1984		Plaintiffs' Main Brief to Seventh Circuit Court of Appeals filed
April 24, 1984		Defendant's Reply Brief to Seventh Circuit Court of Appeals filed
December 26, 1984		Decision of United States Court of Appeals for Seventh Circuit (reported at 751 F.2d 203)
January 4, 1985		Seventh Circuit enters order allowing Defendant's Motion for Extension of Time in Which to File Petition for Rehearing to and including January 18, 1985
January 18, 1985		Defendant's Petition for Rehearing with Suggestion for Rehearing In Banc filed
March 8, 1985		Order of Seventh Circuit denying Defendant's Petition for Rehearing with Suggestion for Rehearing In Banc
March 21, 1985		Seventh Circuit enters order staying mandate to and including April 15, 1985
April 19, 1985		Seventh Circuit enters order staying mandate to and including May 17, 1985
May 22, 1985		Seventh Circuit enters order staying mandate to and including June 6, 1985

Date	Record No.	Proceedings
June 6, 1985		Petition for a Writ of Certiorari filed by AT&T Technologies, Inc. filed
July 8, 1985		Brief in Opposition to Petition for Writ of Certiorari filed by Communications Workers of America and its Local 5090
July 15, 1985		Reply to Opposition to Petition for Writ of Certiorari filed by AT&T Technologies, Inc.
October 7, 1985		Order of Supreme Court granting Petition for Writ of Certiorari

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMUNICATIONS WORKERS OF AMERICA, and its LOCAL 5090, Plaintiffs, v. WESTERN ELECTRIC COMPANY, INC., Defendant.	No. 82 C 0772 Judge Grady

AMENDED COMPLAINT

Plaintiffs Communications Workers of America (hereinafter "CWA") and its Local 5090, by their attorneys, for a cause of action against Defendant Western Electric Company, Inc. (hereinafter "Western Electric") allege as follows:

JURISDICTION

1. This action is brought pursuant to and jurisdiction is founded upon Section 301 (29 U.S.C. §185) of the Labor Management Relations Act of 1947 (hereinafter the "Act"). 29 U.S.C. §141, *et seq.*

PARTIES

2. Plaintiffs CWA and Local 5090 (hereinafter collectively referred to as the "Unions") are each labor organizations within the meaning of the terms and provisions of the Act. The Unions are, and at all times relevant have been, the statutory collective bargaining agents of certain employees of Western Electric. In general, the Unions represent those employees of Western Electric who are installers. Local 5090 is an affiliated local union of the CWA.

3. Local 5090 represents Western Electric's installers in Wisconsin and Illinois.

4. Western Electric is a New York Corporation, doing business in various states, including Illinois. It is engaged in interstate commerce. It is an employer within the meaning of the Act.

CLAIM

5. At all times material herein, the Unions and Western Electric had in full force and effect a collective bargaining agreement (hereinafter "the contract"). A copy of this contract ("CWA—16") is attached to the original Complaint as Exhibit "A." Said contract sets forth the terms and conditions of employment of certain of Western Electric's employees, primarily those employees who do installation work.

6. Article 7 of the contract establishes a grievance procedure for the parties. Article 8 provides for final and binding arbitration should the parties be unable to resolve a grievance.

> "1. If the National and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties. Such demand shall be presented within ninety (90) days after the Company notifies the Union of its final answer to the grievance. Each such referral shall include but one such dispute unless otherwise agreed. If, within ten (10) days of such demand, the parties are unable to agree on the person to be selected as arbitrator, an arbitrator shall be designated upon request of either party by the Federal Mediation and Conciliation Service. The di-

rect expense of the arbitration, but not including the expense incurred by the parties or their witnesses, shall be borne equally by the Union and the Company.

2. The arbitrator shall have no authority to alter or modify the provisions of this contract. Any decision made in compliance with the foregoing shall be final and the parties agree to abide by such decision."

7. On or about September 17, 1981, Local 5090 timely filed a grievance (Exhibit "B" attached hereto) protesting Western Electric's announced intention to lay off approximately 79 installers at its Chicago, Illinois base location. (Grievance No. 16-66-7). This grievance alleges that the layoffs would be a violation of Article 20 of the contract. Article 20, ¶3 of the contract, *inter alia*, requires that a layoff be due to a lack of work. In this grievance, the Unions allege, *inter alia*, that such layoffs would violate Article 20 of the contract because there was no lack of work at the Chicago, Illinois base location which justified a layoff.

8. On or about September 25, 1981, 79 installers from the Chicago, Illinois base location, members of Local 5090, were laid off, notwithstanding the grievance (Exhibit "B") referred to in Paragraph 7 and notwithstanding that there was work available for them.

9. The grievance was thereafter processed through the grievance procedure. The parties were unable to settle the grievance.

10. By letter dated January 26, 1982, the Unions demanded arbitration of the aforesaid grievance. A copy of the demand for arbitration is attached hereto as Exhibit "C".

11. Western Electric has failed and refused to permit arbitration of the grievance.

12. The refusal of Western Electric to proceed to arbitration over the aforesaid grievance is frivolous, not in good faith, and constitutes a willful breach of the parties' collective bargaining agreement.

WHEREFORE, Plaintiffs pray that this Court enter judgment:

A. Compelling Defendant Western Electric to arbitrate the grievance in accordance with the collective bargaining agreement.

B. Awarding costs and reasonable attorneys' fees to the Plaintiffs.

C. Granting such other relief as the Court finds just and equitable.

/s/ STANLEY EISENSTEIN

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Communications Workers of America
INSTALLATION BARGAINING UNIT

GRIEVANCE RECORD

Local No. 5090

Job Location Various Date 9/17/81

Town Various State Illinois

Time and Date of Occurrence 9/25/81 Date Reported 9/11/81

Name of Member or Members Involved All involved installers

Dated Presented to Job Il. Mgr. 9/17/81 Name of Mgr. M. Windle

Service Date Various Rate of Pay Various Contract Article Involved 20

NATURE OF GRIEVANCE:

The lay off of Illinois based installers on 9/25/81 is not contractually justified.

DEMAND FOR SETTLEMENT:

Do not lay off these installers.

STATEMENT OF SUPERVISOR:

STATEMENT OF UNION:

Lay off is not contractually justified, therefore should not take place.

Settled Satisfactorily ..... yes ..... no

Date referred to higher levels of grievance procedure. .....

Signed ..... Member(s) Signed /s/ JOHN A. SMYKOWSKI Steward-Officer

John A. Smykowski,
President CWA Local 5090

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMUNICATIONS WORKERS OF AMERICA, and its LOCAL 5090, Plaintiffs, v. WESTERN ELECTRIC COMPANY, INC., Defendant.	No. 82 C 0772 Judge Grady

ANSWER OF DEFENDANT
WESTERN ELECTRIC COMPANY, INC.
TO PLAINTIFFS' AMENDED COMPLAINT

NOW COMES Defendant WESTERN ELECTRIC COMPANY, INC., by its attorneys, Seyfarth, Shaw, Fairweather & Geraldson, and hereby answers the Plaintiffs' Amended Complaint as follows:

FIRST DEFENSE

Amended Complaint

1. This action is brought pursuant to and jurisdiction is founded upon Section 301 (29 U.S.C. § 185) of the Labor Management Relations Act of 1947 (hereinafter the "Act"). 29 U.S.C. § 141, et seq.

Answer

1. Defendant admits that Plaintiffs purport to bring this action pursuant to and seek jurisdiction under that statute cited in paragraph 1 of the Amended Complaint, but the Defendant denies that Plaintiffs have a cause of action under said statute.

Amended Complaint

2. Plaintiffs CWA and Local 5090 (hereinafter collectively referred to as the "Unions") are each labor organizations within the meaning of the terms and provisions of the Act. The Unions are, and at all times relevant have been, the statutory collective bargaining agents of certain employees of Western Electric. In general, the Unions represent those employees of Western Electric who are installers. Local 5090 is an affiliated local union of the CWA.

Answer

2. Defendant admits the allegations of paragraph 2 of the Amended Complaint.

Amended Complaint

3. Local 5090 represents Western Electric's installers in Wisconsin and Illinois.

Answer

3. Defendant admits the allegations of paragraph 3 of the Amended Complaint.

Amended Complaint

4. Western Electric is a New York Corporation, doing business in various states, including Illinois. It is engaged in interstate commerce. It is an employer within the meaning of the Act.

Answer

4. Defendant, Western Electric Company, Inc., is a New York corporation authorized to do business in Illinois. It is doing business, among other places in Illinois, in Chicago, Aurora and Joliet, Illinois.

Amended Complaint

5. At all times material herein, the Unions and Western Electric had in full force and effect a collective bargaining agreement (hereinafter "the contract"). A copy of this contract ("CWA—16") is attached to the original Complaint as Exhibit "A." Said contract sets forth the terms and conditions of employment of certain of Western Electric's employees, primarily those employees who do installation work.

Answer

5. Defendant admits the allegations of paragraph 5 of the Amended Complaint as to the CWA. The collective bargaining agreements are between Western Electric and the national CWA. Local 5090 is not a contracting party to the agreement.

Amended Complaint

6. Article 7 of the contract establishes a grievance procedure for the parties. Article 8 provides for final and binding arbitration should the parties be unable to resolve a grievance.

> "1. If the National and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties. Such demand shall be presented within ninety (90) days after the Company notifies the Union of its final answer to the grievance. Each such referral shall include but one such dispute unless otherwise agreed. If, within ten (10) days of such demand, the parties are unable to agree on the person to be selected as arbitrator, an arbitrator shall be designated upon request of either party by the Federal Mediation and Conciliation Service. The di-

rect expense of the arbitration, but not including the expense incurred by the parties or their witnesses, shall be borne equally by the Union and the Company.

2. The arbitrator shall have no authority to alter or modify the provisions of this contract. Any decision made in compliance with the foregoing shall be final and the parties agree to abide by such decision."

Answer

6. Defendant admits that Article 7 of the contract establishes a grievance procedure for the parties and that Article 8 provides for final and binding arbitration of disputes not otherwise excluded by other provisions of the contract.

Amended Complaint

7. On or about September 17, 1981, Local 5090 timely filed a grievance (Exhibit "B" attached hereto) protesting Western Electric's announced intention to lay off approximately 79 installers at its Chicago, Illinois base location. (Grievance No. 16-66-7). This grievance alleges that the layoffs would be a violation of Article 20 of the contract. Article 20, § 3 of the contract, *inter alia*, requires that a layoff be due to lack of work. In this grievance, the Unions allege, *inter alia*, that such layoffs would violate Article 20 of the contract because there was no lack of work at the Chicago, Illinois base location which justified a layoff.

Answer

7. Defendant admits that Local 5090 filed a grievance protesting the Defendant's intention to lay off approximately 79 installers of the Chicago, Illinois base location, but denies the remaining allegations contained in paragraph 7 of the Amended Complaint. Further, Defendant states affirmatively that the contract reserves lack of work declarations to the exclusive judgment of the Company.

Amended Complaint

8. On or about September 25, 1981, 79 installers from the Chicago, Illinois base location, members of Local 5090, were laid off, notwithstanding the grievance (Exhibit "B") referred to in Paragraph 7 and notwithstanding that there was work available for them.

Answer

8. Defendant admits that on or about September 25, 1981, it laid off 79 installers from the Chicago, Illinois base location, but denies the remaining allegations contained in paragraph 8 of the Amended Complaint.

Amended Complaint

9. The grievance was thereafter processed through the grievance procedure. The parties were unable to settle the grievance.

Answer

9. The Defendant admits that the layoff grievance was denied by reason that the Defendant's determination to lay off installers due to lack of work is not an arbitrable dispute and therefore could not violate the parties collective bargaining agreement.

Amended Complaint

10. By letter dated January 26, 1982, the Unions demanded arbitration of the aforesaid grievance. A copy of the demand for arbitration is attached hereto as Exhibit "C".

Answer

10. The Defendant admits that on or about January 26, 1982, the Unions demanded arbitration of the layoffs.

Amended Complaint

11. Western Electric has failed and refused to permit arbitration of the grievance.

Answer

11. The Defendant admits that it has refused to arbitrate the layoff grievance, and affirmatively states that its conduct has not, in any way, violated the collective bargaining agreement.

Amended Complaint

12. The refusal of Western Electric to proceed to arbitration over the aforesaid grievance is frivolous, not in good faith, and constitutes a willful breach of the parties' collective bargaining agreement.

Answer

12. The Defendant denies all of the allegations contained in paragraph 12 of the Amended Complaint and affirmatively states that its conduct complained of has not, in any way, violated the parties' collective bargaining agreement.

SECOND DEFENSE

The grievance which forms the basis for the Plaintiffs' Amended Complaint is not arbitrable under Article 9, ¶ 1 of the parties' collective bargaining agreement, which reads as follows:

> 1. *Management functions.*
>
> The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this contract, *but otherwise not subject to the provisions of the arbitration clause*) to exercise the functions of managing the business which involve, among other things, the hiring and placement of employees, *the termination of employment*, the assignment of work, the determination of methods and equipment

> to be used, and the control of the conduct of the work. (Emphasis supplied.)

Article 1, ¶ 1.11 of the parties' collective bargaining agreement provides:

> The terms "Layoff" or "Laid-Off" shall cover a termination of employment arising out of a reduction in the force due to lack of work.

Thus, the parties' collective bargaining agreement specifically excludes from arbitration of the Defendant's decision to lay off employees by reason of lack of work.

THIRD DEFENSE

The Defendant herein incorporates and reasserts in this Answer all of its responses and defenses stated in its Answer to Plaintiffs' original Complaint.

WHEREFORE, Defendant WESTERN ELECTRIC COMPANY, INC., prays that the relief requested in the Amended Complaint be denied, that judgment be entered in favor of the Defendant and against Plaintiffs and that Defendant be awarded its costs, including reasonable attorneys fees.

Respectfully submitted,

GERALD D. SKONING
CHARLES C. JACKSON
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(312) 346-8000

By /s/ LYNNE F. SIEGEL
One of the Attorneys for
Defendant Western Electric
Company, Inc.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois
(312) 346-8000

Dated: July 21, 1982

CONTRACT CWA-16

Contract CWA-16 by and between the WESTERN ELECTRIC COMPANY, INCORPORATED, a New York Corporation, and the COMMUNICATIONS WORKERS OF AMERICA, in behalf of those Employees in the bargaining unit as determined by the National Labor Relations Board in Case No. 2-RC-5006.

ARTICLE 1

DEFINITIONS

1. Except where otherwise indicated, the following definitions of terms shall apply throughout this contract:

1.1 "Company" means Western Electric Company, Incorporated.

1.2 "Area" means an administrative unit of the Installation Field forces which is under the direction of a Manager of the Bell Sales Division of the Company.

1.3 "Local Management" means the Installation supervisory personnel of the Bell Sales Division of the Company.

1.4 "National" means Communications Workers of America.

1.5 "Local" means any one of the chartered Locals of the National as now or hereafter constituted and which represent the Employees working in the respective Areas of the Bell Sales Division of the Company. The Locals as of the date of this contract are as follows:

Alabama Local No. 10990
Albany Local No. 1191
Arizona, New Mexico, El Paso County Local No. 8590
Carolinas Local No. 3790
Connecticut Local No. 1290
Denver Local No. 8490
Georgia-Florida Local No. 3290
Illinois-Wisconsin Local No. 5090
Indiana Local No. 5790

Kansas City Local No. 6391
Kentucky-Tennessee Local No. 10890
Louisiana-Mississippi Local No. 10490
Michigan Local No. 4090
Missouri-Arkansas-Kansas Local No. 6390
New Jersey Local No. 1090
New York Local No. 1190
North Pacific Local No. 9290
Northwestern Local No. 7290
Ohio Local No. 4390
Oregon Local No. 9291
Pacific Local No. 9490
Philadelphia Local No. 2590
Pittsburgh Local No. 2591
Southern California Local No. 11590
Southwestern Local No. 12290
Washington Local No. 2390

1.6 "Union" means both the National and the Locals.

1.7 "Union Representative" means a person elected or appointed in a duly authorized manner as a representative or agent of the National, the Local, or both.

1.8 "Employee" means communication equipment worker, for whom the National is recognized as exclusive bargaining representative, except for other specialized workers temporarily hired by the Company.

* * *

1.11 The term "Layoff" or "Laid-Off" shall cover a termination of employment arising out of a reduction in the force due to lack of work.

* * *

ARTICLE 7

GRIEVANCE PROCEDURE

1. Grievances Presented by the Union

* * *

1.5 For the purpose of adjusting grievances of Employees who, at the time of the grievance, were represented by the Union, the Company shall recognize the Union as representing:

1.51 Employees reclassified to a salary-rated non-supervisory occupation, Laid-Off, suspended for disciplinary reasons, dropped, relieved or discharged, provided the grievance is presented to the Company by the Local within thirty (30) days after the Employee is reclassified or separated from the payroll, except that where the justification of the action is involved in disciplinary suspension, relieved, dropped or discharged cases, the provisions of Article 22, Disciplinary Suspension, or Termination of Employment-Relieved, Dropped or Discharged, will apply.

* * *

1.6 If the National and the Company fail to settle by negotiation any grievance arising with respect to the interpretation of this contract, or the performance of any obligation hereunder, such grievance may be subject to arbitration in accordance with Article 8 of this contract as the final step in the settlement thereof.

* * *

ARTICLE 8

ARBITRATION

1. If the National and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties. Such demand shall be presented within ninety (90) days after the Com-

pany notifies the Union of its final answer to the grievance. Each such referral shall include but one such dispute unless otherwise agreed. If, within ten (10) days of such demand, the parties are unable to agree on the person to be selected as arbitrator, an arbitrator shall be designated upon request of either party by the Federal Mediation and Conciliation Service. The direct expense of the arbitration, but not including the expense incurred by the parties or their witnesses, shall be borne equally by the Union and the Company.

* * *

ARTICLE 9

UNION AND COMPANY RELATIONSHIPS

1. Management Functions

The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of the work.

* * *

ARTICLE 20

ADJUSTMENTS TO THE WORKING FORCE

1. The Company desires to maintain employment as near to a constant level as possible. Both parties recognize, however, that the needs of the business and its efficient operation may necessitate reassignment of personnel or the addition to, or decrease in the working force.

* * *

3. When lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Term of Employment and by Layoff groups as set forth in the following:

3.1 Employees with less than four (4) years Term of Employment shall be first Laid-Off in inverse order of Term of Employment. The Layoff group shall be the Employees assigned to a Base Location.

3.2 Employees with a Term of Employment of four (4) years but less than eight (8) years shall be next Laid-Off, in inverse order of Term of Employment, except that 10% of the total number of such Employees as of the time Layoffs start may be exempt from Layoff and retained on the roll. The Layoff group shall be the Employees assigned to all Base Locations within an Area.

3.3 Employees retained on the roll under the provisions of Paragraph 3.2 shall be next Laid-Off.

3.4 Employees with a Term of Employment of eight (8) years but less than ten (10) years shall be next Laid-Off, in inverse order of Term of Employment, except that 10% of the total number of such Employees as of the time Layoffs start may be exempt from Layoff and retained on the roll. The Layoff group shall be the Employees assigned to all Base Locations within an Area.

3.5 Employees retained on the roll under the provisions of Paragraph 3.4 shall be next Laid-Off.

3.6 Employees with ten (10) years' or more Term of Employment shall be next Laid-Off, in inverse order of Term of Employment. The Layoff group shall be the Employees assigned to all Base Locations.

4. Notwithstanding the provisions of Paragraph 3, it is agreed that an Employee in a particular Work Location need not be Laid-Off if the forward work load at that location indicates that the Employee of longer Term of Employment who would otherwise be transferred to that location to take the place of the Employee Laid-Off would have to be Laid-Off within a period of six (6) months.

5. In the event it should be determined that a former Employee has been Laid-Off other than in accordance with the provisions of

Paragraph 3, the obligation of the Company shall be to rehire such Employee at the time of such determination.

6. When it appears possible in meeting the needs of the customer, and practicable from the standpoint of the dispersion of the working force, to reduce work effort in a spread work movement by short timing operations below normal, the Company will advise the Local involved and suitable plans for such procedure shall be arrived at through negotiations, giving due consideration to the expected work load situation and the customers' requirements.

* * *

ARTICLE 22

DISCIPLINARY SUSPENSION OR TERMINATION OF EMPLOYMENT—RELIEVED, DROPPED OR DISCHARGED

1. In all cases in which the Company suspends an Employee for disciplinary reasons, or the Company's termination of an individual's employment is classified as "Relieved," "Dropped" or "Discharged," the Union shall be notified of the action being taken by the Company as soon as practicable after the Employee is notified. When termination of employment is involved, such notice shall precede the effective date of the termination of employment except that when the Company considers it necessary to remove an Employee immediately from the Job Location it may do so without advance notice. In such a case the Union Representative shall forthwith be notified; however, when the Union Representative is not immediately available, issuance of the leaving notice shall be postponed until the Union Representative has been notified, or a period of five (5) days has elapsed, whichever first occurs.

* * *

3. If settlement is not reached in the grievance procedure, as provided in Paragraph 2 above, such dispute may be referred to

arbitration in accordance with Article 8 of this contract, provided the Employee involved has a Term of Employment of more than six (6) months. However, in the case of any dispute referred to arbitration as provided herein, the authority of the Arbitrator shall be further limited to a determination of whether or not the Company had just cause in "Suspending," "Relieving," "Dropping" or "Discharging" such Employee or Employees.

* * *

ARTICLE 25

MAINTENANCE OF WORK OPERATIONS

1. No officer, representative or member of the Union shall authorize, instigate, condone or engage in a strike, work stoppage or interruption of work operations, including absences to attend Union meetings that would have the same effect as a strike or work stoppage, during the period of this contract.

* * *

Labor Agreements Handbook
Western Electric Company, Incorporated
Installation Division

Section 1
Part 1
7-6-51
Replaces pages 1-6 of
9-23-49 & 7-8
25-27 of 12-1-50

CONTRACT CEW-1

*CONTRACT dated this 4th day of April 1949, by and between the WESTERN ELECTRIC COMPANY, INCORPORATED, a New York Corporation, and the COMMUNICATIONS WORKERS OF AMERICA, in behalf of those employees in the bargaining unit as determined by the National Labor Relations Board in Case No. 2-R-5003;

WHEREAS, the parties have as a result of past negotiations entered into the following contracts presently in effect:

Wages and Working Conditions Contract dated May 20, 1947

Agreement dated December 29, 1947

Supplementary Contract No. 2 dated September 16, 1948

Supplement No. 1 dated November 1, 1948

WHEREAS, the parties for their mutual convenience desire the currently applicable provisions of said contracts to be combined and arranged in one document:

NOW, THEREFORE, the parties state their agreement with each other in the following form, in substitution for said contracts:

* * *

ARTICLE 7

GRIEVANCE PROCEDURE

1. Grievances Presented by the Union

* * *

*1.6 If the International and the Company fail to settle by negotiation any grievance arising with respect to the interpretation of this Contract, or the performance of any obligation hereunder, such grievance may be subject to arbitration in accordance with Article 8 of this Contract as the final step in the settlement thereof.

*Amended in accordance with provisions of Agreement dated June 22, 1951.

* * *

ARTICLE 8

ARBITRATION

*1. If the International and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this Contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this Contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties. Each such referral shall include but one such dispute unless otherwise agreed. If, within ten (10) days of such demand, the parties are unable to agree on the person to be selected as arbitrator, he shall be designated upon request of either party by the U.S. Conciliation Service. The direct expense of the arbitration, but not including the expense incurred by the parties or their witnesses, shall be borne equally by the Union and the Company.

* * *

ARTICLE 9

UNION AND COMPANY RELATIONSHIPS

* * *

*Amended in accordance with provisions of Agreement dated June 22, 1951.

2. Management Functions

The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this Contract, but otherwise not subject to the provisions of the arbitration clause), to exercise the functions of managing the business which involve, among other things, the hiring and placement of employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of the work.

* * *

ARTICLE 20

SENIORITY WITH RESPECT TO LAYOFFS

1. Layoffs

1.1 Layoffs, caused by lack of work, shall be made (1) by layoff areas and (2) in the inverse order of seniority within service groups of employees located within the layoff area.

* * *

CONTRACT CEW-2

CONTRACT CEW-2 dated this 23rd day of April, 1952, by and between the WESTERN ELECTRIC COMPANY, INCORPORATED, a New York Corporation, and the COMMUNICATIONS WORKERS OF AMERICA, in behalf of those Employees in the bargaining unit as determined by the National Labor Relations Board in Case No. 2-R-5003.

ARTICLE 1

DEFINITIONS

1. Except where otherwise indicated, the following definitions of terms shall apply throughout this contract:

* * *

1.12 The terms "Layoff" or "Laid-Off" shall cover a termination of employment arising out of a reduction in the force due to lack of work.

* * *

ARTICLE 7

GRIEVANCE PROCEDURE

1. Grievances Presented by the Union

* * *

1.6 If the International and the Company fail to settle by negotiation any grievance arising with respect to the interpretation of this contract, or the performance of any obligation hereunder, such grievance may be subject to arbitration in accordance with Article 8 of this contract as the final step in the settlement thereof.

* * *

ARTICLE 8

ARBITRATION

1. If the International and the Company fail to settle by negotiation any differences arising with respect to the interpretation of

this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties. Each such referral shall include but one such dispute unless otherwise agreed. If, within ten (10) days of such demand, the parties are unable to agree on the person to be selected as arbitrator, he shall be designated upon request of either party by the Federal Mediation and Conciliation Service. The direct expense of the arbitration, but not including the expense incurred by the parties or their witnesses, shall be borne equally by the Union and the Company.

* * *

ARTICLE 9

UNION AND COMPANY RELATIONSHIPS

1. Management Functions

The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of the work.

* * *

ARTICLE 20

ADJUSTMENTS TO THE WORKING FORCE

1. The Company desires to maintain employment as near to a constant level as possible. Both parties recognize, however, that the needs of the business and its efficient operation may necessi-

tate reassignment of personnel or the addition to, or decrease in the working force.

* * *

3. When lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Term of Employment and by Layoff groups as set forth in the following:

* * *

304 N.Y. 578

In the Matter of the Arbitration between WESTERN ELECTRIC COMPANY, INCORPORATED, *Respondent*, and COMMUNICATIONS WORKERS OF AMERICA, *Appellant*.

Argued April 16, 1952; decided May 29, 1952.

Arbitration—matters arbitrable—labor unions—employer suspended thirty-two employees for two days for leaving work in protest of attempted assignment of two employees from regular day shift to evening and night shift—collective bargaining agreement between employees' union and employer provided that employer might suspend or terminate deduction of dues provisions of agreement where union failed to take prompt corrective action upon notice of violation of agreement—Special Term granted motion for order staying arbitration, stating that right of employer to terminate employment was not abridged by right to suspend deduction of dues in event of work stoppage—order properly affirmed.

Matter of Western Elec. Co. (Communications Workers of America), 279 App. Div. 730, affirmed.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 11, 1951, which, by a divided court, affirmed an order of the Supreme Court at Special Term (MCNALLY, J.), entered in New York County, granting a motion by respondent for an order staying arbitration between the parties. Members of the appellant labor union who were employed in the installation division of petitioner-respondent, which is a manufacturing unit of the Bell Telephone System, were working in a single shift during regular day hours on an installation operation in Michigan. Respondent assigned an employee of the regular day shift to a shift to begin at 11:00 P.M. on June 3, 1951, and another such employee to a shift to begin at 3:00 P.M. on June 4, 1951. The two employees did not report for the new assignment but appeared for the regular day shift at 7:30 A.M. on June 4th. Upon being told that there was no

work for said two employees on that shift, thirty other employees engaged in similar work left the job for the day. As a result respondent suspended the thirty-two employees for two days. On June 15, 1951, the labor union demanded arbitration, stating that the issue was: "did such suspensions violate the agreement between the parties in that Article 22, Section 3.2 provides the exclusive penalty which the Company may impose when there has been a violation of Article 22, Section 3.1?" Section 3.1 of article 22 of the collective bargaining agreement between the parties stated that: "No officer, representative or member of the Union shall authorize, instigate, condone or engage in a strike, work stoppage or interruption of work operations * * * during the period of this Contract." Section 3.2 of article 22 provided as follows: "The Company may suspend or terminate the Deduction of Dues provisions of this Contract for any Local involved where prompt and corrective action is not taken after notice by the Company to the Business Agent of such Local in the event of a violation of the foregoing provisions of Paragraph 3.1." Section 1 of article 18 of the agreement provided that differences with respect to the interpretation of the agreement or the performance of any obligation thereunder should be settled by arbitration but section 2 of article 8 provided, in part, that: "The arbitrator shall have no authority to alter or modify the provisions of this Contract." Section 2 of article 9 provided that: "The Union recognizes the right of the Company * * * to exercise the functions of managing the business which involve, among other things, the hiring and placement of employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of the work." Special Term concluded that: "Section 3 [which included 3.1 and 3.2] of article 22 of the contract relates to the remedy against the union in the event it instigates, condones, or engages in a strike, work stoppage or interruption of work during the term of the contract. In such case the petitioner may suspend the deduction of dues. Section 2 of article 9 of the contract, however, preserves the petitioner's right of

management and specifically the right to terminate employment. The right to terminate employment is in nowise abridged by the petitioner's contractual right to suspend deduction of dues in the event of a work stoppage. The [labor union's] claim that section 3 of article 22 specifies the petitioner's exclusive remedy in respect of a work stoppage is untenable. No arbitrable question involving the interpretation of the contract is present."

Henry Mayer and *Abraham Weiner* for appellant.

William J. Butler, Robert A. Levitt and *Allen S. Wilder* for respondent.

Order affirmed, wth costs; no opinion.

Concur: LOUGHRAN, Ch. J., LEWIS, CONWAY, DESMOND, DYE and FROESSEL, JJ. Dissenting: FULD, J.

107 N. E. 2d 76

WESTERN ELECTRIC COMPANY, INCORPORATED, *Respondent*, for an Order Staying an arbitration demand by COMMUNICATIONS WORKERS OF AMERICA, *Appellant*.

Court of Appeals of New York.
May 29, 1952.

Appeal from Supreme Court, Appellate Division, First Department, 279 App. Div. 730, 108 N.Y.S.2d 1014.

Proceeding in the matter of the application of Western Electric Company, Incorporated, for an order staying an arbitration demand by the Communications Workers of America.

The company suspended 32 employees for two days without pay as punishment for having concertedly walked off one of the company's installation jobs in protest against certain shift changes affecting two of their number. The union made a grievance of the suspension but the grievance procedure was exhausted without settlement.

The union claimed that the company violated the agreement when it imposed a unilaterally devised penalty and ignored provisions of the contract which had direct and specific application to a work stoppage. Article 22 of the agreement provided that no officer or member of the union should instigate a work stoppage during the contract period and that the company could suspend or terminate the deduction of dues where prompt and corrective action was not taken after notice to the business agent of the local in event of violation.

The company did not notify the union of the work stoppage nor did it give the union an opportunity to take prompt and corrective action.

It was the company's position that it suspended the employees because of their unexcused absence thereby making it unnecessary to apply the article which pertained only to work stoppages.

The Appellate Division, 279 App. Div. 730, 108 N.Y.S.2d 1014, affirmed an order in favor of the applicant, and the union appealed. The union argued that the dispute was arbitrable because it fell within scope of the arbitration clause and the union's claim was real and substantial, that the grounds urged by the company did not serve to stay arbitration of the dispute between the parties. The petition contended that the contract plainly did not preclude the suspension of the 32 employees in question, and hence the order should be affirmed.

Henry Mayer, of New York City (Abraham Weiner, of New York City, of counsel), for appellants.

Root, Ballantine, Harlan, Bushby & Palmer, of New York City (William J. Butler, of New York City, Robert A. Levitt, of New York City, Allen S. Wilder, of New York City, of counsel), for petitioner-respondent.

Order affirmed with costs.

All concur except FULD, J., who dissents.

EXCERPTS FROM UNION BARGAINING MINUTES, APRIL 24, 1953

FRIDAY—April 24, 1953

1953 Bargaining

Meeting convened at 3:40 P.M.

Full Company Committee, including Nichols

Full Union Committee, including Weaver

* * *

COMPANY—Want to list those items on which we are in tentative agreement:

> Articles 2, 3, 4, 6, 10, 11, 15, 17 and 18. The Company is willing to drop the things that we proposed in paragraph 4.2. 1.5 (sic), we are dropping both of those. Agree on the basis of what is now in CEW-2. I will go through the items we list as in dispute and give you our position:

* * *

COMPANY—One of the items we were spending a lot of time on is union activity under Article 5. We are not trying to impede the Union. We still feel it is reasonable to expect a union officer to work at least half of his time. That is certainly reasonable.

UNION—You ought to at least be consistent then. If you finally realize the Union is grown up, we should be treated as a business and dealt with in a fair manner—why don't you go all the way with that? You have a Contract that is full of Company discretion clauses. You also want a management functions clause that nullifies the whole contract. You want to discriminate without action of the Union. If they take any action, you can suspend them. The Union is a business but you want to control that business. If you want that, you should pay bargaining time and everything else. In some respects, you carry through and treat us as an operating business and then take all the tools away from us in the contract.

COMPANY—I don't agree with that. The management functions clause covers those functions we reserve to our judgment. Manner and conduct of the work. The grievance procedure and arbitration, certain subjects are excluded. That is something both sides went into with their eyes open. That is why we wanted the 50% rule.

UNION—We had 20%. The Company belly-ached that they never had to work for the Company and could still be retained as an employee. Then we raised it to 33%. Then 50%. Then you did not want to pay for bargaining time. You wanted bargaining time to be union business. You are going right along the line of treating the union as a business. We will go right down the line with you. However, do it in every way in the contract. Let things be mutual between the parties and throw out all these damn clauses that don't exist in other Union contracts. You won't have to pay out a damn nickle (sic) toward union business.

COMPANY—We feel we are now making sizable concessions to the Union officers. There is a two to four year rule on Leaves. Retained on the roll with only 50% of their time on company duty.

UNION—It is a damn disgrace to be bargaining for employees of a Company that forces you on a Leave of Absence to be able to do so. Negotiating a contract is a common business between the Union and the Company.

COMPANY—While negotiating, I am doing my assignment (sic) Company duty. The Union committee is doing its assigned union duties.

UNION—The Company would not have a business if we didn't. Look at the provisions in other Union contracts.

COMPANY—We bargain a contract under which we expect the employees of this Company to work.

UNION—You don't need a management functions clause for that. The Union You (sic) have the "no strike" and management

discretion all through the contract. The things you exempt from arbitration also prevents the Union from representing them. You are circumventing the laws when you take away the Union's voice. We are not arguing about this bargaining time. Let's get some of the rules out of here and treat the union as a business all the way.

COMPANY—We have to keep in mind that management is charged with the management of the business. There are certain items which we have indicated we will make subject to a third party's review. Other ones should be management decisions.

UNION—How do we represent a man you lay off? It is Company discretion.

COMPANY—You have the grievance procedure.

UNION—You can review it up and down. The discretion is still with the Company. Therefore, we don't represent those people even though we are authorized by law. The Company keeps taking away things unless forced to keep them by law. Article 5 is not consistent with other provisions of the Contract. You throw these things in just as bargaining positions which is unfair bargaining. There is not must (sic) point in this discussion. You indicated you are not moving away from this position. You knew your proposals were unacceptable. We told you that last night. We said we were willing to sit down and bargain. What did you propose to do, knowing this was not acceptable?

COMPANY—We have outlined our position.

UNION—We dropped a lot of our very reasonable demands. We brought in demands only on things we thought we had a reasonable chance of getting because of what exists throughout the system. I am talking about items other than wages and transfers which are non-money items. The Company would not have been out of line to grant every one of those demands. You come out

with another counterproposal on a package basis and drop two items. You wanted to take something away on reasons for not working overtime and because you drop it, that is supposed to mean progress.

EXCERPTS FROM WESTERN ELECTRIC COMPANY NEGOTIATING MINUTES, APRIL 29, 1953

* * *

The Union asked if there were other ways of separating, not by "Relieved, Dropped, Discharged and Transfers". The Company mentioned layoff as being the only other way at Company instigation. This could be checked. The Union stated that these forms say relieved, dropped or discharged. If the Company were to change this and use the term fired, this could not be covered by the Agreement. The Company stated that standard terms have been used for years and these are not changed overnight. The four ways of separating at Company instigation: relieved, dropped, discharged and laid off. There is one other. If you run out your Sickness Benefits on a Disability Leave of Absence. If a man with polio, for example, runs out his benefits and is still unable to work he is placed on disability leave. If there is no possibility of his returning he is separated as being unable to meet physical requirements.

* * *

Discharge is a severe case, a serious criminal offense or serious act of such nature. An employee is relieved when a less serious act is committed, a minor infraction of rules. The term dropped is generally confined to those unfitted (sic) for the work, etc.

CONTRACT CEW-3

CONTRACT CEW-3 dated this 3rd day of May, 1953 by and between the WESTERN ELECTRIC COMPANY, INCORPORATED, a New York Corporation and the COMMUNICATIONS WORKERS OF AMERICA, in behalf of those Employees in the bargaining unit as determined by the National Labor Relations Board in Case No. 2-R-5003.

ARTICLE 1

DEFINITIONS

1. Except where otherwise indicated, the following definitions of terms shall apply throughout this contract:

* * *

1.12 The terms "Layoff" or "Laid-Off" shall cover a termination of employment arising out of a reduction in the force due to lack of work.

* * *

ARTICLE 7

GRIEVANCE PROCEDURE

1. Grievances Presented by the Union

* * *

1.6 If the International and the Company fail to settle by negotiation any grievance arising with respect to the interpretation of this contract, or the performance of any obligation hereunder, such grievance may be subject to arbitration in accordance with Article 8 of this contract as the final step in the settlement thereof.

* * *

ARTICLE 8

ARBITRATION

1. If the International and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties. Such demand shall be presented within ninety (90) days after the Company notifies the Union of its final answer to the grievance. Each such referral shall include but one such dispute unless otherwise agreed. If, within ten (10) days of such demand, the parties are unable to agree on the person to be selected as arbitrator, he shall be designated upon request of either party by the Federal Mediation and Conciliation Service. The direct expense of the arbitration, but not including the expense incurred by the parties or their witnesses, shall be borne equally by the Union and the Company.

* * *

ARTICLE 9

UNION AND COMPANY RELATIONSHIPS

1. Management Functions

The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determi-

nation of methods and equipment to be used, and the control of the conduct of the work.

* * *

ARTICLE 20

ADJUSTMENTS TO THE WORKING FORCE

1. The Company desires to maintain employment as near to a constant level as possible. Both parties recognize, however, that the needs of the business and its efficient operation may necessitate reassignment of personnel or the addition to, or decrease in the working force.

2. The Company shall give the International or Local involved advance notice of any anticipated Layoff program.

3. When lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Terms of Employment and by Layoff groups as set forth in the following:

* * *

ARTICLE 22

TERMINATION OF EMPLOYMENT— RELIEVED, DROPPED OR DISCHARGED

1. In all cases in which the Company's termination of an individual's employment is classified as "Relieved", "Dropped" or "Discharged", the Union shall be notified of the action being taken by the Company as soon as practicable after the Employee is notified. Such notice shall precede the effective date of the termination of employment except that when the Company considers it necessary to remove an Employee immediately from the Job Location, it may do so without advance notice. In such a case the Union Representative shall forthwith be notified; however,

when the Union Representative is not immediately available, issuance of the leaving notice shall be postponed until the Union Representative has been notified, or a period of five (5) days has elapsed whichever first occurs.

* * *

3. If settlement is not reached in the grievance procedure, such dispute may be referred to arbitration in accordance with Article 8. However, in such case the authority of the Arbitrator shall be further limited to a determination of whether or not the Company has acted unreasonably in "Relieving", "Dropping" or "Discharging" such Employee.

* * *

EXCERPT FROM COMPANY BARGAINING MINUTES, MAY 17, 1954

DUNNE [Union]: It was more than an illustration, if the situation had arisen. The Asbury Park and Spring Lake jobs had a large crew. If we had to lay off the surplus of 175 people, and Newark dropped off to nothing and it had a surplus, would you layoff in Asbury Park and transfer Newark people down?

FORD [Company]: Are the Asbury Park people assigned to the Asbury Park Base Location?

DUNNE: I'm sure they weren't.

FORD: Were most on Temporary Transfer?

DUNNE: A lot were hired there.

FORD: If it is a Base Location, the short service people might remain there longer than others. But if there were a problem in Newark, there is probably a problem in the entire Area. You may clean up one job, but . . .

DUNNE: What if there were a 5½ month man in Newark and a 30 day man in Asbury Park?

FORD: If the 5½ month man were assigned to Newark and the one month man to Asbury Park, and if there were a surplus of people in Newark, we would layoff the man in the Newark Base.

DUNNE: Right.

FORD: To carry this up, you are talking expanding the areas throughout. You propose for the 4 to 10 year man the zone. One Area may layoff people with more than 4 years, and another Area may not. The short service man may be retained in one Area and a longer service man laid off in the adjacent Area.

DUNNE: We want to strike that out.

FORD: You're not attempting to take care of only the short service man; you're expanding it. We feel that we give reasonable treatment. For 4–10 years. Area can be a large piece of the country.

DUNNE: The extremes would be New York and Denver.

FORD: Probably.

DUNNE: You have cut the Atlanta layoff area in half.

FORD: That's correct for the 4 to 10 year group.

DUNNE: Under the terms of the old Contract you would have split the layoff area.

FORD: Yes.

EXCERPT FROM COMPANY SUPERVISORS' LABOR RELATIONS GUIDE (ARTICLE 20, SEPTEMBER 17, 1974)

ADJUSTMENTS TO THE WORKING FORCE

* * *

3. These provisions are applicable only in the case of reductions in the force due to lack of work. A temporary suspension of operations because of reasons such as indicated below is not considered a layoff, and consequently employees sent home for short periods for such reasons shall not come under these layoff provisions. It is likewise not intended that an employee whose services are terminated at his own request shall be considered as "Laid-off."

Layoffs should be instituted in those situations where the work load indicates a need for a permanent reduction in the number of employees in a Base Location or Area. Under the following circumstances an employee's services shall not be considered terminated by LAYOFF nor shall an employee be considered LAID OFF—when the employee's services are temporarily interrupted because of but not limited to such causes as material shortage, equipment failure, power failure, labor dispute, or other circumstances which cause a temporary cessation or reduction in operations.

* * *

PETITIONER'S

BRIEF

(5)

Supreme Court, U.S.
FILED
NOV 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1913

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1985

AT&T TECHNOLOGIES, INC.,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA
and its LOCAL 5090,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the fundamental principle of labor law that a party cannot be ordered to arbitrate a labor dispute unless a court first determines that the collective bargaining agreement so mandates can be subject to a broad "exception" under which the threshold question of arbitrability must be delegated to an arbitrator whenever it can be characterized as involving interpretation of "substantive provisions" and not merely a "standard arbitration clause."

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No. 84-1913

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1985

AT&T TECHNOLOGIES, INC.,
Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA
and its LOCAL 5090,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals and the denial of rehearing and rehearing *en banc* are reported *sub nom. Communications Workers* v. *Western Electric Co.,* 751 F.2d 203 (7th Cir. 1984),[1] and are reproduced in the Petition for Certiorari (1A-8A, 13A). The opinion of the District Court is unreported and is also reproduced in the Petition for Certiorari ("Cert. Pet.") (9A-11A).

JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 1984. Petitioner filed a timely Petition for Rehear-

[1]Western Electric Company, Inc. changed its name to AT&T Technologies, Inc. after this case was filed. Petitioner's Statement Required By Rule 28.1 appears at page ii of the Petition For Certiorari.

ing on January 18, 1985, after the time for filing was extended by the Court of Appeals. That Petition was denied in an Order dated March 8, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The following provisions of the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.*, are pertinent to this case:

Section 201(b), 29 U.S.C. § 171(b):

It is the policy of the United States that—

* * *

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration . . . or by such methods as may be provided for in any applicable agreement for the settlement of disputes.

Section 203(d), 29 U.S.C. § 173(d):

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Section 301(a), 29 U.S.C. § 185(a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner AT&T Technologies, Inc. ("the Company") and Respondents Communications Workers of America and its Local 5090 ("the Union") are parties to a national collective bargaining agreement which applies to the telephone equipment installation workers represented by twenty-six local unions. R. 1, Ex. A. Article 8 of this agreement provides for arbitration of disputes not "excluded from arbitration by other provisions of this contract."[2] Article 9 specifies that certain decisions such as the termination of employment (which includes layoffs due to lack of work) are "not subject to the provisions of the arbitration clause"[3] unless those management rights are limited by other provisions of the agreement. The only other provision of the agreement that affects the Company's right to lay off employees is Article 20. It provides

[2]Article 8 provides:

> If the National [Union] and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (*provided that such dispute is not excluded from arbitration by other provisions of this contract*, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties. . . .

J.A. 21 (emphasis added). That all contract disputes are not arbitrable is further demonstrated by Article 7's provision that only certain unresolved grievances "may" be arbitrable. See J.A. 21.

[3]Article 9 provides:

> The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this contract, *but otherwise not subject to the provisions of the arbitration clause)* to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, *the termination of employment*, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of the work.

J.A. 22 (emphasis added). Article 1.11 defines "layoff" as a "termination of employment arising out of a reduction in the force due to lack of work." J.A. 20.

that "when lack of work necessitates Layoff, Employees shall be Laid-off" by seniority and by layoff groups, thereby prescribing the order in which employees are to be laid off. J.A. 22-24.

On September 17, 1981, the Union filed a grievance that challenged an earlier Company decision to lay off 79 installers from its Chicago base location. This grievance was based solely on the Union's contentions that the collective bargaining agreement prohibits any layoff of employees unless there is in fact a lack of work in that location and that "there was no lack of work at the Chicago, Illinois base location which justified a layoff" there.[4] J.A. 8. The Company refused to submit the grievance to arbitration on the ground that the dispute is not arbitrable under the labor agreement. The Union then filed this action to compel arbitration in the United States District Court for the Northern District of Illinois.

In the District Court, the Union and the Company each recognized that the District Court had a duty to determine whether the arbitrator's jurisdiction extended to disputes over whether there had been a lack of work justifying a layoff. Each party filed a motion for summary judgment on this issue, with each side relying upon evidence that related exclusively to the parties' intent to submit or withhold these disputes from arbitration. See R. 33, 42, 43, 59, 61. This undisputed evidence included an earlier New York Court of Appeals' decision that construed the same lan-

[4]The Union does not claim that the Company was motivated by anything other than its business judgment in making the layoffs. R. 55, at 64; R. 56, at 16-18, 24-25; R. 57, at 38, 88-89. Further, in this grievance, the Union expressly agreed that "the Company honored the provisions of [Article 20] in the order of layoff" but grieved solely because the Union believed that "[t]here was no lack of work." See R. 25, at 11-12. After filing this grievance, the Union filed five additional grievances protesting the transfer and layoff of certain installers. The Company agreed to arbitrate these grievances as they concerned only the order in which installers were selected for transfer and layoff. R. 24, at ¶¶ 11, 15, 18, 21.

guage now set forth in Articles 8 and 9 to exclude Company termination decisions from arbitration,[5] and bargaining history that showed that the arbitration of grievances over sufficiency of work had not been provided for in any subsequent contract. J.A. 32-43. Further, it was not disputed that the Union had not attempted to arbitrate any of the thousands of earlier layoffs during the parties' thirty-three year bargaining relationship on the grounds that there was sufficient work. R. 55, at 24, 40, 46; R. 57, at 18, 32-33, 35; R. 31, at ¶¶ 4, 9.

At no time did either party present evidence on the question whether there was in fact sufficient work. Nor did they otherwise litigate the merits of the underlying lack of work dispute. In short, both sides recognized that the issue of arbitrability was for the District Court, and both sides proceeded accordingly.

The District Court, however, refused to rule on whether lack of work disputes had been excluded from arbitration. Instead, it ordered the parties to submit the arbitrability question itself to arbitration. The District Court reasoned that the Union's contention that the contract terms required arbitration was at least "arguable" and that it was "for the arbitrator, not the court, to decide whether the union's interpretation has merit." Cert. Pet. 11A; see *id.* 3A n.4. On that basis, the Court did not consider either the exclusionary language found in the contract or the prior judicial interpretations and other undisputed evidence that the parties never intended to arbitrate this dispute. Cert. Pet. 10A-11A.

The Court of Appeals affirmed the District Court's order. The Court of Appeals recognized that "the general rule" established by this Court's decisions is "that the arbitrability issue is for the

[5]*In re Arbitration Between Western Electric Co.* and *Communications Workers*, 304 N.Y. 578, 107 N.E.2d 76 (1952); J.A. 32-36. Article 20 was also part of the contract at the time of the New York Court of Appeals' decision. J.A. 28, 30-31.

courts to decide unless otherwise stipulated by the parties"—as it had not been here. Cert. Pet. 4A. However, the Court of Appeals found that a determination of arbitrability in this case would require the District Court not only to interpret the "arbitration clause (a task clearly within its province)," but also to interpret "the Management Functions Clause [Article 9] and the Adjustment to Working Force Clause [Article 20]" to determine if the layoff dispute had been excluded from arbitration. Cert. Pet. 7A.[6] The Court of Appeals held that, absent specific language in the contract, courts are prohibited from construing the latter exclusionary provisions—which the Court of Appeals characterized as "substantive provisions"—by virtue of this Court's admonitions that courts should not decide the "merits" of the dispute "in the guise of determining arbitrability." Cert. Pet. 5A, *quoting United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 569 (1960).

The Court of Appeals then held that this case falls within an "important exception" to the "general rule" requiring judicial determinations of arbitrability. The exception which the Court of Appeals fashioned applies where, as the Court found to be the case here, "the collective bargaining agreement contains a standard arbitration clause," "the parties have not clearly excluded the arbitrability issue from arbitration," and "deciding the [arbitrability] issue would entangle the court in interpretation of substantive provisions of the collective bargaining agreement [not merely the standard arbitration clause] and thereby involve consideration of the merits of the dispute." Cert. Pet. 7A.

Because it concluded that the determination whether Article 9 excluded the layoff dispute from arbitration "goes to the merits of the dispute," the Court of Appeals held that the District Court

[6] In the Court of Appeals' view, "interpretation" was required because it found that there were, on the face of the agreement, "colorable arguments both for and against exclusion" of the layoff dispute from arbitration. Cert. Pet. 7A.

properly refused to consider the prior judicial interpretation of these provisions and their bargaining history. Cert. Pet. 8A.

The Court of Appeals acknowledged that its "exception" to the "general rule" was "difficult to reconcile with the Supreme Court's discussion of a court's duty to decide arbitrability in [*John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 546-47 (1964)]." The Seventh Circuit asserted, however, that the discussion in *Wiley* was "dicta" and that this Court had in any event reopened the issue in *Nolde Brothers, Inc.* v. *Local No. 358, Bakery Workers Union*, 430 U.S. 243, 255 n.8 (1977). See Cert. Pet. 6A.

SUMMARY OF ARGUMENT

The Court of Appeals' decision is squarely inconsistent with the "firmly entrenched" principle of labor law that has guided the negotiation and administration of collective bargaining agreements for twenty-five years: the duty to arbitrate is contractual and no party can be ordered to arbitrate a dispute in the absence of a prior "judicial determination that the collective bargaining agreement does in fact create such a duty." *E.g., John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 547 (1964); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). This Court's prior decisions foreclose the "exception" to the "general rule" that the Court of Appeals has fashioned.

First, they reject the Court of Appeals' conclusion that the fact that the "parties have not clearly excluded arbitrability from arbitration" can permit arbitrators to determine their own jurisdiction. Rather, this Court has adopted precisely the opposite position. The *only* circumstance in which labor arbitrators may determine their own jurisdiction is when the parties explicitly so provide in their contract. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. at 583 n.7. This requirement of judicial

determinations of arbitrability fosters the objective of promoting arbitration of disputes by assuring employers that they can agree to arbitrate certain kinds of disputes, while maintaining judicially enforceable rights to exclude specified fundamental management decisions from arbitration. See Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509-10 (1959), cited with approval in *Warrior & Gulf*, 363 U.S. at 583 n.7.

The Court of Appeals' contrary conclusion may rest on a misapprehension of this Court's statements that there is a "presumption" of arbitrability. This evidentiary presumption guides the courts when *they* determine an arbitrator's jurisdiction. It does not permit courts to delegate to arbitrators the determination of their own jurisdiction.

Second, this Court's decisions likewise reject the Court of Appeals' holding that courts, in determining arbitrability, are confined to "standard arbitration clauses" and must defer to arbitrators on the meaning of exclusionary language if it is located in a "substantive provision." This Court's decisions and the purposes of the labor laws require courts to consider all evidence of an intent to exclude a dispute from arbitration, especially express language excluding specifically defined management rights from arbitration, regardless of where (or whether) it is located in the agreement. See *Warrior & Gulf*, 363 U.S. at 584-85; *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 572-73 (1960) (Brennan, J., concurring). The Court of Appeals' distinction between "arbitration clauses" that can be judicially interpreted in determining arbitrability and "substantive provisions" that cannot is both unworkable and irrational.

The Court of Appeals' "exception" ultimately rests on a misunderstanding of this Court's admonitions that courts should not decide the merits of arbitrable disputes in the guise of determining arbitrability. This warning does not and cannot prohibit

courts from discharging their obligation to interpret contractual provisions that exclude specific disputes from arbitration and that thus define the arbitrator's jurisdiction. Rather, it warns courts not to take arbitrable disputes away from arbitrators on the ground that the court believes an arbitrable contract claim is meritless. Both the court and the arbitrator interpret the contract. The court interprets to determine the arbitrator's jurisdiction. The arbitrator interprets to resolve the merits of arbitrable disputes. In performing their separate tasks, each may find it necessary to examine some of the same contract provisions that the other may also consider. This Court has held that the arbitrator's existence does not and cannot oust the court from performing its central task of deciding arbitrability.

Finally, to adopt the Court of Appeals' position at this late date would subvert the purposes of the labor laws. It would inhibit the negotiation of new agreements providing for arbitration of specified disputes. It would also impermissibly alter the methods chosen for resolving disputes in the tens of thousands of collective bargaining agreements that have been adopted in the last 25 years, thereby destroying the interests of those who relied on prior law.

ARGUMENT

For twenty-five years, the negotiation and administration of collective bargaining agreements has been guided by the "firmly entrenched" principle that the arbitrability of a labor dispute is a judicial question and that labor arbitrators may not determine their own jurisdiction unless the parties unmistakably so specify in the agreement.[7] Under this principle, courts may not "decline the invitation to decide arbitrability" (compare Cert. Pet. 7A) and are required to determine whether the parties intended to ex-

[7] *United Steelworkers* v. *Phelps Dodge Corp.*, 764 F.2d 576, 578 (9th Cir. 1985).

clude particular disputes from arbitration on the basis of all the pertinent evidence.

By holding that arbitrators must determine their own jurisdiction whenever the arbitrability issue has not been "clearly excluded" from arbitration and the issue requires consideration of exclusionary language contained in "substantive" contract provisions (and not merely an "arbitration clause"), the Court of Appeals has stood this established principle on its head. To adopt this position now would subvert the central purposes of our labor laws.

I. To Permit Labor Arbitrators To Determine Their Own Jurisdiction Violates The Terms Of The National Labor Statutes, Their Policies, and 25 Years Of Decisions Of This Court.

In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 455-57 (1957), this Court held that Section 301(a) of the Labor Management Relations Act of 1947 ("LMRA") mandated the judicial enforcement of arbitration clauses in collective bargaining agreements under uniform federal standards. In the *Steelworkers Trilogy*,[8] decided three years later, this Court held that national labor policy prohibits a federal court from ordering arbitration of any labor grievance unless the court, and not the arbitrator, first determines that the reluctant party had agreed "to arbitrate the grievance" or to give the arbitrator the "power" to enter an award. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). The sole exception to this principle is where the contract, by its express terms, permits arbitrators to determine their own jurisdiction and where there is a "clear demonstration" that the reluctant party had thus promised to submit arbitrability issues to arbitration. *Id.* at 583 n.7.

[8] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

These holdings rest on the plain terms of Section 301(a), which "assign[s] the courts the duty of determining whether the reluctant party has breached his promise to arbitrate," and on the principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[9] The Court's holdings further implement the explicit directive of Sections 201 and 203 of the LMRA that courts must defer to "the method agreed upon by the parties" to resolve disputes under collective bargaining agreements and that arbitration of disputes may not be imposed when the parties intended otherwise.[10]

The principle that arbitrability is a judicial question implements the most fundamental objective of national labor policy: encouragement of the voluntary resolution of disputes by collective bargaining and arbitration. The willingness of employers to enter into agreements that provide for arbitration of specified disputes often depends on the existence of assurances that fundamental business decisions—such as when to lay off employees[11]

[9] *Id.* at 582-83; *accord United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 571 (1960) (Brennan, J., concurring).

[10] The LMRA rejected proposals to impose binding arbitration on employers who have not agreed to it. Thus, while Section 201(b) makes it clear that it is the policy of the United States to encourage arbitration as *one* means for labor and management to settle their differences, it is likewise national labor policy to respect "such [other] methods as may be provided for in any applicable agreement for the settlement of disputes." Section 203(d) accordingly states that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for application or interpretation of an existing collective bargaining agreement" and dictates that the parties' "agreed upon" method of dispute resolution should be respected, whatever that method may provide. See Goetz, *Arbitration After Termination of a Collective Bargaining Agreement*, 63 Va. L. Rev. 693, 705 n.48 (1977); *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 221-22 (1979); *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103-04 (1970).

[11] Indeed, a ruling that would affect employers' ability to exclude from arbitration the dispute over whether layoffs were justified by a lack of

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—may be excluded from review by arbitrators. These assurances, in turn, depend on the principle that limitations on the scope of the obligation to arbitrate are judicially enforceable. As Professor Cox stated—in an article relied on in the *Steelworkers Trilogy*—the protection sought by an employer would be "drastically reduced" if labor arbitrators had the "power to determine their own jurisdiction" and "as a practical matter" to "impose obligations outside the contract limited only by [their] understanding and conscience."[12] Thus, while federal courts should resolve doubts over the arbitrability of disputes "in favor of coverage," *Warrior & Gulf* makes it explicit that courts must interpret any pertinent language in the agreement (or elsewhere) and judicially enforce a clear purpose "to exclude a claim from arbitration." 363 U.S. at 584-85.

The principle that arbitrability is a judicial question has been reiterated in numerous subsequent decisions of this Court.[13] Prob-

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work is, of itself, an extraordinary proposition. Absent explicit language to the contrary, arbitrators simply do not determine whether a layoff was justified by a lack of work, but confine their decisions to whether seniority and other provisions were followed in the layoff. See, *e.g.*, *City of Pontiac*, 73 Lab. Arb. (BNA) 1083, 1086-87 (1979) (Ellman, Arb.); *Western Elec. Co.* and *Communications Workers*, No. 13-243 (1973) (Knowlton, Arb.) (unpublished; see R. 58, Ex. 14 at 8-10) (Company's "right to lay off personnel as its business needs dictate is [under the Installation Contract here], absolute . . . and not subject to either approval or criticism by an arbitrator"); *American Thread Co.*, 39 Lab. Arb. (BNA) 268, 269 (1962) (McCoy, Arb.). See also *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 684 (1981) (provisions for union participation in scope of an enterprise are relatively rare); *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 222-23 (1964) (Stewart, J., concurring) (duty to bargain with union does not extend to matters at core of entrepreneurial control notwithstanding effect on job security in some instances).

[12]Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509-10 (1959), cited with approval in *Warrior & Gulf*, 363 U.S. at 583 n.7. See p. 16, n.18, *infra*. See also Cox, *The Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247, 259 (1958).

[13]*E.g.*, *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374-75 (1974); *International Union of Operating Eng., Local 150* v. *Flair*

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ably the strongest reaffirmation of the principle is found in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 546 (1964). There, this Court held, in reliance on the holdings of *Warrior & Gulf* and its progeny, that "[p]ast cases leave no doubt" that the threshold arbitrability issue is for the courts, not for an arbitrator:

> The duty to arbitrate being of a contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.

376 U.S. at 574. Far from being "dicta" (compare Cert. Pet. 6A), this language was directed at the central issue in the case—whether the successor employer was required to arbitrate the dispute in issue—and simply repeated what this Court's holdings establish.

The Court of Appeals' suggestion (Cert. Pet. 6A) that the issue of the proper forum to decide the question of arbitrability was "reopened" in *Nolde Brothers, Inc.* v. *Local No. 358 Bakery Workers' Union*, 430 U.S. 243 (1977), is not correct. *Nolde Brothers* expressly reaffirmed the principle that the threshold arbitrability question is exclusively for the courts. *Id.* at 250. The issue left open by *Nolde Brothers*, rather, is the distinct question whether, after the judicial determination of arbitrability, an

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Builders, Inc., 406 U.S. 487, 491 (1972); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), *overruled in part on other grounds, Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) ("whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties"); *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U.S. 254, 256 (1962) (same). See also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3354 (1985) (under *Warrior & Gulf*, "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute").

arbitrator can nevertheless decide (contrary to the court) that the grievance is not arbitrable.[14] The *Nolde Brothers* footnote recognizes that there must be the prior judicial determination that the parties have bargained for the arbitrator's decision—which protects all the parties' legitimate interests—and leaves open only the question whether the arbitrator can thereafter disagree with that threshold decision.

Thus, contrary to the Court of Appeals, this Court's decisions reflect a "unanimity of views [that a court] should decide the question of arbitrability," unless the parties have explicitly agreed to the contrary. *Wiley*, 376 U.S. at 547. The principle that a prior judicial determination of arbitrability must precede a compulsory submission of a dispute has been followed by other courts of appeals, even where the Seventh Circuit's "exception" would have precluded a judicial determination of arbitrability.[15]

[14]See 430 U.S. at 255 n.8. ("Certiorari was neither sought, nor granted, on the question of the arbitrator's authority to consider arbitrability *following* referral, and we express no view on that matter") (emphasis added).

[15]See, *e.g.*, *Blake Constr. Co.* v. *Laborers' Int'l Union*, 511 F.2d 324, 327 (D.C. Cir. 1975); *Mobil Oil Corp.* v. *OCAW, Local 8-766*, 600 F.2d 322, 324 (1st Cir. 1979); *Strauss* v. *Silvercup Bakers, Inc.*, 353 F.2d 555, 558-59 (2d Cir. 1965); *Westinghouse Broadcasting Co.* v. *Local 804, Stage Employees*, 616 F.2d 97, 99-100 (3d Cir. 1980); *International Bhd. of Electrical Workers* v. *Western Elec. Co.*, 661 F.2d 514, 516-17 (5th Cir. 1981); *International Union, UAW* v. *General Elec. Co.*, 474 F.2d 1172, 1173-76 (6th Cir. 1973); *Painters, Local 558* v. *Lord & Burnham Constr. Corp.*, 705 F.2d 998, 1000 (8th Cir. 1983); *California Trucking Ass'n* v. *Teamsters, Local 70*, 679 F.2d 1275, 1281 n.5 (9th Cir. 1981), *cert. denied*, 459 U.S. 970 (1982); *Carpenters Dist. Council of Denver* v. *Brady Corp.*, 513 F.2d 1, 3-4 (10th Cir. 1975). In each of the foregoing cases, the federal court made, or required, a judicial determination of arbitrability even though that required consideration of exclusionary language or evidence outside a "standard arbitration clause" and even though the contract had not expressly excluded the arbitrability issue from arbitration.

While the Fifth Circuit has implicitly rejected the Seventh Circuit's approach in *International Bhd of Electrical Workers, supra*, it has issued another decision that may be consistent with the Seventh

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II. There Is No Basis For Creating An "Exception" To The Well-Settled Rule That Arbitrability Is A Judicial Question.

The "exception" that the Court of Appeals has fashioned applies if two basic conditions are present: (1) the parties have not "clearly excluded the arbitrability issue from arbitration" and (2) a determination of arbitrability would require interpretation of exclusionary language contained in "substantive" provisions and not merely the terms of a "standard arbitration" clause. See Cert. Pet. 7A–8A.[16] However, this Court's decisions establish that neither condition can justify an exception to the long settled rule and that the Court of Appeals' decision is based on a misapprehension of labor law principles that have quite different purposes.

A. Arbitrators Cannot Determine Their Own Jurisdiction Unless The Parties Clearly So Provide.

This Court has rejected the Court of Appeals' conclusion that arbitrators can make the threshold determination of their own jurisdiction so long as the "parties have not clearly excluded the arbitrability issue from arbitration." In *Warrior & Gulf*, this Court held precisely the opposite: an intent to permit arbitrators to decide their own jurisdiction can never be inferred from silence in a contract. Rather, the only circumstance in which an arbitrator can decide the threshold issue of arbitrability is when the parties have expressly and unmistakably agreed that the arbitrator is to

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Circuit's exception. See *Oil, Chemical & Atomic Workers Int'l Union, Local No. 423* v. *American Petrofina of Texas*, 759 F.2d 512, 515 (5th Cir. 1985). See also *A. S. Abell Co.* v. *Baltimore Typographical Union No. 12*, 338 F.2d 190, 195 (4th Cir. 1964) (same).

[16]The Court of Appeals also referred (Cert. Pet. 7A) to the presence of a "standard arbitration" clause in the contract, but this does not appear to be a separate element to its "exception." Rather, it seems to refer to the fact that arbitrability is not "clearly excluded" from arbitration in such a clause.

make that decision. The proponent of this claim bears the burden of making a "clear demonstration" that this was in fact the parties' intent:

> Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.[17]

Warrior & Gulf, 363 U.S. at 583 n.7, *citing* Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1508–09 (1959).[18]

[17]See also *id.* at 571 (Brennan, J., concurring) ("the meaning of the arbitration clause itself, is for the judge unless the parties *clearly* state to the contrary") (emphasis added). Courts are thus prohibited from presuming that parties to a collective bargaining agreement have agreed to arbitrate arbitrability questions simply because a dispute over arbitrability arises. "Questions of arbitrability" cannot be "automatically resolved . . . in the union's favor by asserting the existence of a dispute" over the meaning of such provisions; courts must resolve the issue rather than rely on conclusory claims of arbitrability. *Trailways of New England, Inc.* v. *Amalgamated Ass'n*, 353 F. 2d 180, 182 (1st Cir. 1965).

The Court of Appeals erroneously relied (Cert. Pet. 4A) on Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 Mich. L. Rev. 751 (1965), for the contrary view. This article states that arbitrability is an issue for judicial determination, even where the arbitration clause is silent or ambiguous. *Id.* at 758–59.

[18]In this article, Professor Cox had recognized that, in some instances, it might be more economical to allow the arbitrator to rule on arbitrability, but concluded that, on balance, the purposes of the labor laws could only be served by requiring judicial determinations of arbitrability in all cases involving "conventional arbitration clause[s]:"

> I am persuaded that the conventional arbitration clause is not an agreement which allows an arbitrator to interpret its meaning, thereby determining his own jurisdiction . . . The protection sought by the employer would be drastically reduced by a construction which gave the arbitrator unlimited power to determine his own

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The Court of Appeals' reversal of this settled rule may rest on a misapprehension of the principle that doubts concerning arbitrability "should be resolved in favor of coverage." See *Warrior & Gulf*, 363 U.S. at 583. However, this evidentiary presumption merely provides guidance as to how the arbitrability issue should be decided by a court. It cannot support the Court of Appeals' holding that arbitrators can determine their own jurisdiction.

B. Courts Are Required To Consider All Evidence Of The Parties' Intent To Exclude Particular Disputes From Arbitration.

The Court of Appeals' further holding that courts may not decide arbitrability if it requires the interpretation of exclusionary language that is not contained in a "standard arbitration clause" rests on an even more basic misapprehension of the governing principles. In determining arbitrability, this Court's decisions direct courts to interpret language (such as Article 9 of the instant agreement) that exclude specifically defined disputes from an arbitration clause, regardless of where the clause is located in the agreement and, indeed, regardless of whether the exclusionary evidence is in the agreement at all. By the same token, this Court's decisions preclude a court from deferring to an arbitrator's interpretation of such exclusionary language on the ground that it is deemed to be contained in a "substantive provision" of the collective bargaining agreement.

Because the [illegible]ms and purposes of the labor law require that the courts give effect to the parties' intent to exclude matters from

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> jurisdiction and merely warned against its exercise, for as a practical matter he would then have the power to impose obligations outside the contract limited only by his understanding and conscience. We can give effect to the underlying purpose only by excepting the interpretation of the arbitration clause from the general power to interpret, thus giving the court the duty to determine whether the claims which one side wishes to arbitrate gives rise to a dispute concerning the "interpretation and application" of the collective bargaining agreement.

Cox, *supra*, 72 Harv. L. Rev. at 1508–10.

arbitration (see pp. 10-12, *supra*), the *Steelworkers Trilogy* and this Court's subsequent decisions make it explicit that there can be no limit on the kinds of evidence that a court will consider in assessing that intent.[19] This Court's decisions reject any suggestion that courts may confine themselves to the "arbitration clause" of the contract in considering arbitrability. The Court stated in *Warrior & Gulf* that the court must consider "an express provision excluding a particular grievance from arbitration" (like Article 9) or any other "forceful evidence of a purpose to exclude," including even "collateral agreements" not contained within the four corners of the contract. 363 U.S. at 584-85. As Justice Brennan stated in his separate opinion in *American Manufacturing Co.*, judicial interpretations of clauses excluding specifically defined disputes from arbitration—like Article 9—are absolutely central to the judicial task imposed by Section 301. See *American Mfg. Co.*, 363 U.S. at 572-73 (Brennan, J., concurring).[20] The courts must consider all pertinent evidence of a clear intent to exclude certain claims for arbitration, regardless of where that evidence is located.

[19]Of course, once it is recognized that "exclusionary" provisions like the Management Functions Clause (Article 9) must be interpreted in ruling on arbitrability, it follows that the court must consider prior judicial interpretations of these provisions, bargaining history, and any other "forceful evidence" of a contractual purpose to exclude particular kinds of disputes from arbitration. *Warrior & Gulf*, 363 U.S. at 584-85.

As the Court stated in *American Mfg. Co.*, in determining arbitrability "special heed [must] be given to the context in which collective bargaining agreements are negotiated and the purpose they are intended to serve." 363 U.S. at 566. Similarly, this Court has repeatedly relied upon bargaining history in interpreting provisions of collective bargaining agreements, see, *e.g.*, *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 708-10 (1983); *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 221-22 (1979); *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 492-94, 499-500 (1979); and courts of appeals have recognized its relevance to arbitrability issues. Se: *Communications Workers* v. *Pacific Northwest Bell Tel. Co.*, 337 F.2d 455, 459 (9th Cir. 1964); Cert. Pet. 14 n.11 (and cases cited). Indeed, the Seventh Circuit had previously recognized that bargaining history and other parol evidence must be assessed whenever courts decide arbitrability. See, *e.g.*, *Local 81, American Fed. Tech. Eng.* v. *Western Elec. Co.*, 508 F.2d 106, 108 (7th Cir. 1974); *Associated Milk Dealers, Inc.* v. *Milk Drivers Union, Local 753*, 422 F.2d 546, 551 (7th Cir. 1970).

Thus, in *Warrior & Gulf*[21] and in subsequent decisions,[22] this Court itself has interpreted the very kinds of exclusionary lan-

[20]Justice Brennan stated that where, as here, the "exclusion clause" is "quite specific," it is far easier to find that the parties had "manifested" an "interest in confining the arbitrator" than it had been on the facts of *Warrior & Gulf*:

> The very ambiguity of the *Warrior* exclusion clause suggests that the parties were generally more concerned with having an arbitrator render decisions as to the meaning of the contract than they were in restricting the arbitrator's jurisdiction. The case might of course be otherwise were the arbitration clause very narrow, or the exclusion clause quite specific, for the inference might then be permissible that the parties had manifested a greater interest in confining the arbitrator; the presumption of arbitrability would then not have the same force and the court would be somewhat freer to examine the merits.

363 U.S. at 572-73. (Brennan, J., concurring).

Justice Brennan's point was that the comparative ambiguity or specificity of the arbitration and exclusionary clauses may be relevant to the weight of the arbitrability presumption. Federal courts have almost uniformly agreed, and have engaged in these very comparisons of the relative specificity of arbitration and exclusionary clauses in ruling on arbitrability. See *Rochdale Village, Inc.* v. *Public Serv. Employees' Union, Local No. 80*, 605 F.2d 1290, 1295 (2d Cir. 1979) (and cases cited). Yet the Court of Appeals here held that an exclusionary clause is one of the "substantive" provisions that cannot even be considered by a court, much less compared to the arbitration clause.

[21]In *Warrior & Gulf*, the Court interpreted language in a management functions clause, finding that the language was too "vague" to support the claim that any and all subcontracting disputes were excluded from arbitration, that the arbitration clause was "quite broad," and that it was therefore not clear that the subcontracting dispute had been excluded from arbitration. 363 U.S. at 584. The Court made it explicit that the outcome would have been different if there had been either a "written collateral agreement" suggesting nonarbitrability, an "express provision excluding a particular grievance from arbitration," or other "forceful evidence of a purpose to exclude the claim from arbitration." *Id.* at 585.

[22]For example, in *Nolde Brothers* this Court examined the sections of the agreement pertaining to wages and vacations as well as the arbitra-

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guage that the Court of Appeals held that only arbitrators could consider. In each case, moreover, the exclusionary language was not contained in the arbitration clause, but rather in what the Court of Appeals would characterize as a "substantive provision."

C. The Court Of Appeals' Exception Is Unworkable And Misconceives The Admonition Against A Court's Deciding The Merits Of A Dispute.

Even if the issue were not foreclosed by prior decisions of this Court, the Court of Appeals' distinction between "arbitration clauses" that courts can interpret and "substantive provisions" that they cannot should be rejected as unworkable and irrational on its face.[23] It is commonplace for exclusionary language bearing on arbitrability of a dispute to be scattered throughout an agreement, with explicit language confining an arbitrator's jurisdiction appearing in no-strike clauses, management rights

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tion clause in determining the arbitrability of a severance pay dispute. 430 U.S. at 245-46 & nn. 2-3, 248-50. In *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 242-43 & n. 1 (1962), the Court analyzed exclusionary language bearing on the arbitrability of various disputes which was found in the no-strike clause, a provision concerning "general disputes," the management rights clause, and the grievance and arbitration provisions of the collective bargaining agreement. See also *Wiley*, 376 U.S. at 553 n. 7 (noting provisions other than arbitration clause "which expressly deny arbitration to specific events"); *Painters Local 558* v. *Lord & Burnham Constr. Co.*, 705 F.2d 998, 1000 (8th Cir. 1983) (reversal of district court for failure to consider side agreement); *Westinghouse Broadcasting Co.* v. *Local 804, Stage Employees*, 616 F.2d 97, 99-100 (3d Cir. 1980) (district court failed to examine exclusionary language found in parties' side agreement); *Strauss* v. *Silvercup Bakers, Inc.*, 353 F.2d 555, 556 (2d Cir. 1965) (district court erred by not considering parol evidence concerning exclusionary language found in provision outside arbitration clause).

[23]The Seventh Circuit already has had difficulty applying its analysis. See *Teamsters Local 703* v. *Kennicott Bros.*, 771 F.2d 300 (7th Cir. 1985) (analyzing provisions outside grievance/arbitration article to decide arbitrability questions).

clauses, and other provisions. See p. 19, n. 22, *supra*. There are no available criteria for labeling some of the exclusionary provisions as "substantive" and others as "nonsubstantive."[24] To attempt to enforce such distinctions, moreover, would inevitably interfere with the determination of the threshold issue: whether the parties intended to exclude a dispute from arbitration.

Here, for example, it is wholly unrealistic to hold that the fact that exclusionary language is inserted into a management rights clause and not a "standard arbitration clause" transforms the exclusionary language into a "substantive provision" that the court cannot interpret.[25] More significantly, it is simply irrational to adopt a rule under which the fact that this exclusionary language is not located in the "arbitration clause" would have the slightest significance in a suit to compel arbitration and would force a court to close its eyes to prior judicial interpretations of the same language in an earlier contract between the same parties.

The Court of Appeals' "exception" ultimately rests on its misapprehension of this Court's earlier admonitions that federal courts, in ruling on arbitrability, should "view with suspicion an attempt to persuade [them] to become entangled in the construction of the substantive provisions of a labor agreement, even

[24]This Court has recognized that such distinctions cannot easily be maintained. In *Wiley*, this Court was asked to rule that courts should also consider claims of "procedural arbitrability" as well as the claims of "substantive" (subject matter) arbitrability that were addressed in *Warrior & Gulf*. After holding that the threshold "substantive" arbitrability issue was for the courts, *Wiley* observed that "labor disputes of the kind involved [in that case] cannot be broken down so easily into their 'substantive' and 'procedural' aspects." 376 U.S. at 556.

[25]Indeed, what is and what is not a "substantive" provision can never be clear. For example, Article 1.11 of the instant contract (J. A. 20) bears on arbitrability because it defines a key term in the exclusionary language of the agreement (Article 9): that "terminations" include "layoffs due to lack of work." Whether this definitional language is "substantive" or not, it certainly informs the court's judgment in determining the scope of exclusionary language and cannot rationally be ignored.

through the back door of interpreting the arbitration clause," *Warrior & Gulf*, 363 U.S. at 585, and should not undertake to "determine the merits of a grievance under the guise of interpreting the grievance procedure." *American Mfg. Co.*, 363 U.S. at 569. These admonitions, however, manifestly were not directives to ignore express exclusionary clauses merely because they happen to be located in provisions that are deemed to be substantive. Nor are they, by their terms, even statements that "purely" substantive provisions cannot be considered when they bear on the arbitrator's jurisdiction.

Rather, these admonitions serve quite a different purpose. They reinforced the Court's holding that, in interpreting contract terms, "the judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award," with "doubts [to] be resolved in favor of coverage." *Warrior & Gulf*, 363 U.S. at 582-83. As the Court made clear, courts are not to follow the so-called *Cutler-Hammer* doctrine,[20] under which courts would take otherwise arbitrable disputes away from arbitrators whenever they concluded that the underlying contract claim and grievance were not meritorious. All arbitrable disputes are to be submitted to arbitration, "not merely those which the court deems meritorious." See *American Mfg. Co.*, 363 U.S. at 567-68.

What the Court of Appeals' exception fails to recognize is that if they are to perform their respective tasks, both the court and arbitrator must, on occasion, examine some of the same provisions of the contract. But they do so for different purposes. The court interprets to determine arbitrability. The arbitrator interprets to resolve the merits. The need to prevent judicial interference with the arbitrator's determination of the merits of arbitrable con-

[20] *Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd.*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

troversies cannot and does not require a court to refrain from looking, for its purposes, at the same provisions that the arbitrator may later consider for a different purpose. As this Court held in *Wiley*, when a court's determination of arbitrability rests on its consideration of contract language that also bears on the merits or procedural questions, there is no harm to the arbitral process; "the arbitrator would ordinarily remain free to reconsider ground covered by the court insofar as it bore on the merits of the dispute, using the flexible approaches familiar to arbitration." 376 U.S. at 558.

The Court of Appeals further overlooks that a court cannot discharge its separate obligation to determine whether a dispute has been excluded from arbitration without affecting the outcome on the merits in some respects. Any decision on arbitrability affects the merits in the sense that a holding that the dispute is not arbitrable constitutes a final rejection of the employee's grievance. Similarly, identical contract provisions can be germane both to the threshold question of the arbitrator's jurisdiction and the separate question of the merits. But the terms and purposes of the labor laws do not permit this "inevitable interlocking of the issues" to oust the court from ruling on arbitrability. As the Ninth Circuit has explained:

> There can be little doubt that in cases such as *Warrior* and the case at bar a determination upon the merits will affect the question of arbitrability and vice versa. But we do not apprehend that this almost inevitable interlocking of issues results in ousting the courts from any inquiry beyond the bare written word themselves.

Pacific Northwest Bell Telephone Co. v. *Communications Workers*, 310 F.2d 244, 248 (9th Cir. 1962).

III. To Adopt The Court Of Appeals' Exception At This Late Date Would Subvert The Labor Laws And Defeat Substantial Reliance Interests.

Finally, to adopt the Court of Appeals' exception now would subvert the central purposes of the law. The rule that arbitrability

of labor disputes is a judicial question was designed to promote, and has in fact promoted,[27] a central goal of the labor laws: encouragement of the resolution of disputes through "voluntary arbitration." LMRA, §201(b). Any change that would permit arbitrators to determine their own jurisdiction would allow them to impose obligations outside of the contract. This would chill, if not preclude, employers from agreeing to arbitration of specified types of disputes, contrary to the explicit statutory policy. See pp. 11-12, *supra*.

In 1960, these statutory and policy considerations against adopting a rule that permits labor arbitrators to determine their own jurisdiction were compelling. Today, they are absolutely acute. Tens of thousands of collective bargaining agreements have been negotiated over the intervening 25 years. Each has necessarily been premised on the entrenched principle that arbitrability is a judicial issue, absent a clear statement to the contrary. These agreements have not "clearly excluded arbitrability from arbitration," because, under established law, there was no need or reason to add such language to reflect the parties' intent. Nor have they incorporated all exclusionary language in arbitration clauses, rather than in so-called "substantive provisions." See p. 19, n. 22, *supra*.

To adopt the Court of Appeals' "exception" at this late date would not only inhibit the negotiation of new agreements, but would destroy reliance interests of parties to existing agreements and swallow the "general rule" that they relied upon. See p. 14, n. 15, *supra*. The inevitable result would be that parties to agreements would be subjected to a different method of resolving

[27]Commentators have stated that the *Steelworkers Trilogy's* holding that federal courts will interpret and enforce arbitration obligations has been a major reason why arbitration has been so widely accepted as a means of dispute resolution. See, *e.g.*, Morris, *Twenty Years of Trilogy: A Celebration*, in Decisional Thinking of Arbitrators and Judges, Proceedings of the 33d Ann. Mtg., Nat'l Acad. Arbitrators 331, 335-36, 339-41 (1981).

their disputes than was agreed upon by them. This would be contrary to the explicit language of Sections 201 and 203 of the LMRA. The purposes of our labor laws as well as the most basic considerations of *stare decisis* require the rejection of the Seventh Circuit's position.

CONCLUSION

For the reasons stated, this Court should reverse the Court of Appeals' decision that the issue of arbitrability is to be submitted to arbitration and remand for a judicial determination whether the parties intended to exclude the instant dispute over the sufficiency of work from arbitration.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1985

AT&T TECHNOLOGIES, INC.,
Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA,
AND ITS LOCAL 5090,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1913

AT&T TECHNOLOGIES, INC.,
Petitioner,
v.

COMMUNICATIONS WORKERS OF AMERICA,
AND ITS LOCAL 5090,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENTS

The citations to the opinions below and the basis on which this Court's jurisdiction is invoked are set out at pp. 1-2 of petitioner's brief.

STATUTORY PROVISIONS

The following provisions of the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* are pertinent in this case:

Section 201(b), 29 U.S.C. § 171(b):

> It is the policy of the United States that—
>
> * * * *
>
> (b) the settlement of issues between employers and employees through collective bargaining

may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration . . . or by such methods as may be provided for in any applicable agreement for the settlement of disputes.

Section 203(d), 29 U.S.C. § 173(d):

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Section 301(a), 29 U.S.C. § 185(a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

In September, 1981, AT&T Technologies, Inc. ("AT&T" or "the Company") laid off 79 telephone equipment installers at its Chicago, Illinois base. Within a few days thereafter, the Company transferred approximately the same number of installers from bases in Indiana and Wisconsin to the Chicago base; these installers were assigned to perform the same work which the laid-off Chicago installers had performed. In January 1982, 47 of the transferred installers were advised by the Company that their transfers to Chicago would be made permanent effective February 15, 1982.[1]

[1] In the district court, AT&T acknowledged—indeed presented evidence to prove—that the Company "ha[d] experienced a severe downturn in business in the states of Wisconsin and Indiana"; that

AT&T could have, but did not, transfer the Indiana and Wisconsin installers to other locations, including bases in Ohio, at which there were *bona fide* job vacancies for which the Company was seeking job applicants. R. 56, p. 10 (Deposition of John Smykowski). Instead AT&T created vacancies at the Chicago base by effecting layoffs and filled those vacancies by making transfers while filling the vacancies at other bases by hiring new employees.

At the time of these events, AT&T was party to a collective bargaining agreement with the Communications Workers of America ("CWA") covering installation work. Article 20 of that agreement addressed "Adjustments to the Working Force"; paragraph 3 of that Article provided that "[w]hen lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Term of Employment and by Layoff groups as set forth in the following [six paragraphs]." The first "Layoff group" was defined as follows in subparagraph 3.1:

Employees with less than four (4) years Term of Employment shall be first Laid-Off in inverse order of Term of Employment. The Layoff group shall be the Employees assigned to a Base location.

On September 17, 1981, Local 5090 of the CWA, the local to which Chicago-based installers belong, filed a grievance under the grievance procedure of the collective bargaining agreement. That grievance alleged that the announced (but not then implemented) layoff of the Chicago installers "is not contractually justified." J.A. 10. As more fully developed in the litigation of this case, the

"there is no expectation that the business conditions now existing in Wisconsin and Indiana will improve"; and that "[w]ork does exist in Illinois which the [Indiana and Wisconsin] installers can perform." R. 18, ¶¶ 9-10.

Thus the Company's suggestion in this Court that there is some unresolved "question whether there was in fact sufficient work" at the Chicago base, Pet. Br. at 5, is belied by its own evidentiary showing.

theory underlying that grievance is that Article 20, ¶ 3 permits layoffs of junior employees at a base only if there is a "lack of work" at that base, and that therefore the "layoffs would violate Article 20 of the contract because there was no lack of work at the Chicago, Illinois base location which justified a layoff." J.A. 8.

In January, 1982, after AT&T announced that 47 of the transfers would be made permanent, five additional grievances were filed over the transfers. Three of these grievances were filed by the Chicago local; two additional grievances were filed by Local 5790 of the CWA, the local to which installers in Indiana belong.

The first of these grievances alleged that "Since the Company has procrastinated and delayed [the] pending grievance concerning an unjustified layoff of Illinois installers, the Union views this . . . attempt to permanently transfer installers into the Illinois Area as a further violation of the contract." R. 1, Ex. C. Two additional grievances alleged that the transferees were entitled to "a wider range of permanent transfer locations," R. 1, Ex. D, and "should have been sent to Company areas where work exists," R. 1, Ex. E. The fourth grievance claimed that four of the installers scheduled for permanent transfer had been improperly selected. R. 1, Ex. F. Finally, the fifth grievance sought to have the transferees recalled to their home bases. *See* R. 14, ¶ 18. All of the grievances rested on Article 20 of the collective bargaining agreement.[2]

This action began as a suit by CWA and Local 5090 (collectively referred to as "the Union"), pursuant to

[2] Four of these grievances are exhibits to plaintiff's complaint and are reprinted in an appendix to this brief; the text of the fifth grievance is not in the record but it is summarized in the first affidavit of John Smykowski, President of Local 5090. *See* R. 14.

As the description of the grievances in text demonstrates, the Company's statement in its brief to this Court that the five grievances "concerned only the order in which installers were selected for transfer and layoff," Pet. Br. at 4 n.4, could not be more wrong.

§ 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 ("LMRA"), to enjoin the Company from making the transfers of the Wisconsin and Indiana installers permanent pending arbitration of the grievances that had been filed concerning the transfers. At the time the action was filed the Company had not contested the arbitrability of the initial grievance, the one challenging the layoffs; indeed, on the day after the case was filed the Union's attorney advised the district court that "the parties are in the process of selecting the arbitrator." R. 25, p. 4 (Hearing of February 10, 1982). The Union sought injunctive relief to preserve the *status quo* pending arbitration so that the arbitrator would be able to "render[] a full, complete, meaningful and viable award" and so that the transferees would not be forced to sell their homes and move before an arbitrator determined whether their transfers were valid. R. 1, ¶¶ 19-20.

When AT&T filed its answer to the complaint, the Union discovered that the Company was contending that "[t]he grievances which form the basis for the plaintiff's complaint are not arbitrable under Article 9, paragraph 1 [the management functions provision] of the parties' collective bargaining agreement." R. 7.[3] Subsequently, the Company withdrew its claim that the five grievances that had been filed over the transfers were not subject to arbitration, but continued to so maintain with respect to the grievance over the layoffs. R. 25, p. 4 (Hearing of February 12, 1984).

In light of the position AT&T took in litigation, the Union amended its complaint to seek an order compelling arbitration of the layoff grievance. J.A. 6-9. Ruling on cross-motions for summary judgment, the district entered a judgment in which it was "ORDERED that [the Company] arbitrate the grievance." Pet. App. 12A. The Company appealed this decision to the Seventh Circuit which "affirmed" the order of the district court, and in so doing

[3] The text of Article 9 is reprinted and discussed *infra* at pp. 11-12.

directed that "the Company is ordered to arbitrate the arbitrability issue." Pet. App. 8A.

ARGUMENT

Introduction and Summary

It facilitates analysis in this case, as in the run of cases that arise in an area previously visited by this Court, to begin by measuring the petitioner's claim against the basic principles the Court has already announced and only after so doing to turn to the rightness or wrongness of the lower courts' reasoning in elaborating those principles.

In the "absen[ce of] a collective bargaining agreement," it is the general American rule that "Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and . . . may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). The precise office of the basic substantive provisions of a collective bargaining agreement is to limit these managerial freedoms through mutually agreed rules on such matters as how management "hires and fires" and "pays and promotes."

Here there is a collective bargaining agreement in force that places certain constraints on management; the dispute that gives rise to this case is, as the district court put it, whether Article 20 of that agreement "is a limitation on what management did in this case," Pet. App. 10A. The Union contends that Article 20 limits management's right to make layoffs by requiring that a layoff be due to "lack of work" at the location at which the layoff occurs, J.A. 8; accordingly, the Union challenges AT&T's action in effecting the layoffs at its Chicago base in question here at the same time that the Company maintained the size of the employee complement at that location by transferring in other employees from other locations. The

Company, on the other hand, contends that Article 20 imposes no limit on its authority to reduce forces and that the "contract reserves lack of work declarations to the exclusive judgment of the Company." J.A. 14-15. On that basis AT&T contends that the Company is not required by the contract to defend its decision to effect the layoffs.

The Union seeks to have an *arbitrator* resolve this issue of contract interpretation, pursuant to the arbitration procedure in the collective bargaining agreement. AT&T insists, however, that by resisting arbitration the Company became entitled to a federal court determination of the meaning of Article 20. The Company reaches this conclusion through the following chain of reasoning: Article 9 of the contract provides that management functions are "subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provision of the arbitration clause." The power to reduce forces is one of management's functions and Article 20—as AT&T understands that Article—does not limit management's discretion in this regard. Consequently, the Company concludes, the Union's grievance is not one to enforce "the limitations contained in" Article 20 and therefore the grievance is not arbitrable. The Company states its conclusion this way: "the District Court had a duty to determine whether the arbitrator's jurisdiction extended to disputes over whether there had been a lack of work justifying layoff." Pet. Br. at 4.

The question presented here, therefore, reduces to this: Is it for an arbitrator or for the federal courts to decide what Article 20 of this collective bargaining agreement means? The answer to that question was settled in favor of a decision by an arbitrator over twenty-five years ago by *The Steelworkers Trilogy*. Specifically, *Steelworkers v. American Mfg. Co.*, 363 U.S. 563, 567 (1960), holds that if a grievance asserts a claim "which on its face is governed by the contract," the question "[w]hether the

moving party is right or wrong is a question of contract interpretation for the arbitrator." And *Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 582-83, teaches that where a question concerning the extent of a union's substantive contractual rights also implicates the extent of the arbitrator's contractual jurisdiction, the question is to be submitted to an arbitrator unless "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." On either of these bases, the order mandating arbitration—the only portion of the judgment below by which AT&T, the petitioner here, is aggrieved—is entirely correct and, indeed, is compelled by *American Mfg. Co.* or by *Warrior & Gulf*. Part I, *infra*.

The court below addressed a further issue not resolved by *The Steelworkers Trilogy* or by this Court's subsequent decisions: the significance to be given to an order compelling arbitration in the arbitral proceeding that follows. The lower court concluded that its decision to compel arbitration does not definitively settle the "arbitrability" question and that in a case like this one that question is for the arbitrator; the court of appeals phrased its conclusion as one "declin[ing] the invitation to decide arbitrability," Pet. App. 12A.

Because the court of appeals acted properly in ordering arbitration, this Court need not consider that court's decision to allow the arbitrator to decide "arbitrability" as well as the merits of the Union's grievance; any error that the court below made in this regard prejudiced only the Union and not the petitioner, AT&T. In any event, all that the appellate court did here was merely to coin a novel formulation to express an established truth: under *Warrior & Gulf*, a court's finding of "arbitrability" means only that the governing contract is "susceptible of an interpretation" under which arbitration is appropriate, 363 U.S. at 582-83, and does not determine that the agreement is properly read to provide for arbitration of

the grievance in question. Thus, after a court determines "arbitrability" there still remains a discrete issue of "arbitrability"—or jurisdiction—for the arbitrator to resolve before he is entitled to reach the merits of the grievance. The appellate court's formulation of this rule—its reservation of the word "arbitrability" to define what the arbitrator must find and not what the courts must determine—brings greater clarity to this area of the law by eliminating the ambiguity caused by using the word "arbitrability" in two different senses. Part II, *infra*.

I. Under *The Steelworkers Trilogy* The Grievance At Issue Here Is Arbitrable

Throughout this proceeding the Company has sought to have the courts determine the meaning of Article 20 on the theory that what that Article means determines the arbitrator's jurisdiction and hence determines whether the grievance should be submitted to arbitration. As we proceed to show, the Company's premise and its conclusion are both erroneous. In the first place, the dispute over the scope of Article 20 is *not* a dispute over jurisdiction; the only jurisdictional question is whether the arbitrator is empowered to interpret Article 20, and the contract—and the case law—compel an affirmative answer to that question. Moreover, even if a resolution of the dispute over the meaning of Article 20 would be determinative of the arbitrator's jurisdiction, the governing law is that the courts are to compel arbitration of that dispute.

A. We begin by reviewing the provisions of the collective bargaining agreement that establish the jurisdiction of an arbitrator under that agreement.

Article 8 of the contract is entitled "Arbitration," and provides in pertinent part as follows:

> If the National [Union] and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of an obligation hereunder, such differ-

> ences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract and provided that the grievance procedures as to such disputes have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties. . . .

Elsewhere in the collective bargaining agreement there are several provisions which remove grievances arising under particular articles of the agreement from arbitration. For example, Article 12, which deals with wages, establishes an "Index Plan" for use in fixing the compensation of employees; section 3.3 of that Article provides that "no grievance involving the Index Plan or its administration shall be subject to the arbitration provision of Article 8 of this Contract." Similarly, Article 17 prohibits the Company from making changes in the "Benefit Plan"; section 2 of that Article states that "[n]othing herein shall be construed to subject the Benefit Plan or its administration to the arbitration procedures of Article 8 of this contract." And Article 22 provides that for grievances over disciplinary actions taken against employees with less than six months of service, the Union may appeal to the Area Supervisor "but this shall be considered the final level of discussion of any such grievance"; arbitration of disciplinary grievances is authorized "provided the Employee involved has a Term of Employment of more than six (6) months."

Nothing in Article 20—the Article on which the Union's grievance at issue here is based—purports to remove from the arbitrator the authority that he otherwise would possess under Article 8 to resolve "differences with respect to the interpretation" of Article 20.[4] To the contrary, Article 20 contains a section which sets forth a remedy an arbitrator is to provide if he finds a breach of that Article:

[4] Under the familiar rule of contract construction, *inclusio unius est exclusio alterius*, the parties thus have manifested their intent to leave layoff issues to the arbitration process.

> In the event it should be determined that a former Employee has been laid-off other than in accordance with the provision of Paragraph 3, the obligation of the Company shall be to rehire such Employee at the time of such determination.[5]

Furthermore, with respect to the events that give rise to the instant case, AT&T has conceded the arbitrability of—and has agreed to arbitrate—five grievances that the Union filed under Article 20 over the transfers of the Indiana and Wisconsin installers to Chicago; those transfers are part and parcel of the dispute that also generated the layoff grievance in this case. *See* pp. 4-5, *supra*.

In contesting the arbitrability of the sixth grievance the Union filed under Article 20—the one at issue here that challenges the Company's asserted right to lay off installers at the Chicago base and replace them with installers from other bases—AT&T invokes Article 9 of the collective bargaining agreement, the "Management Functions" Article. That Article provides as follows:

> The Union recognizes the right of the Company (*subject to the limitations contained in the provisions of this contract*, but *otherwise* not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of the work. [Emphasis added.]

By its plain words, the above-quoted Article states that management's functions are "subject to the limitations contained in the provisions of this contract," and that those limitations *are* enforceable in arbitration; a grievance alleging a violation of one of those limitations thus is

[5] Paragraph 3 of Article 20, the paragraph of that Article on which the Union's grievance here is predicated, is set out at p. 3, *supra*.

not excluded from arbitration. Rather, all that Article 9 purports to exclude from the arbitral process are grievances that are not *otherwise* arbitrable—that is, grievances that both fall within the scope of "management functions" and are *not* based upon "limitations contained in the [other] provisions of the contract." Thus, Article 9 would preclude arbitration of, *e.g.*, grievances alleging that the phrasing of the management functions clause itself limits management's discretion or grievances alleging inherent limitations on management functions not based on the contract. As the district court put it:.

> Article 9 does exclude certain management rights from the scope of arbitration, but that exclusion is itself made subject to any limitation on management rights found elsewhere in the contract. Article 20 is a limitation on management rights; the question is whether it is a limitation on what management did in this case. [Pet. App. 10A].

See also Pet. Br. at 3 (Article 9 specifies that "certain decision . . . are 'not subject to the provisions of the arbitration clause' *unless those management rights are limited by other provisions of the agreement*") (emphasis added).[6]

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[6] Thus, this is not a case like *Warrior & Gulf* in which an arbitral exclusion is framed in such a way that, in order to determine whether a particular grievance falls within or without the excluded category, it becomes necessary to evaluate the merits of the grievance. In that case the collective bargaining agreement provided that "[i]ssues . . . which are strictly a function of management shall not be subject to arbitration," 363 U.S. at 576; unlike the contract at issue here, the *Warrior & Gulf* exclusion did not expressly recognize the arbitrability of grievances based upon other provisions of the contract.

Under the *Warrior & Gulf* provision, if a dispute arose over whether management's perogatives were limited in a particular respect, the question whether that grievance posed an issue which was "strictly a function of management" and hence excluded from arbitration would be precisely the same as the question whether the union was correct in asserting that management's perogatives were limited by the contract. Thus, under the *Warrior & Gulf* contract,

Given the narrowly-circumscribed limits of this arbitral exclusion, in order to challenge the arbitrability of the grievance at issue here AT&T is constrained to argue as follows: because Article 20—as the Company understands that Article—does not limit management's discretion in deciding whether to reduce forces at a particular base, the Union's grievance is not one to enforce "the limitations contained in" Article 20 and therefore the grievance is over the exercise of a management function.[7] In other words, AT&T argues that although some layoff disputes arising under Article 20 are arbitrable, the instant grievance is not because the grievance here is based upon (what the Company views as) the Union's incorrect interpretation of that Article.[8] In its brief to the district court, petitioner made this clear, arguing as follows:

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a determination on the merits of such a grievance would be determinative of the arbitrator's jurisdiction.

Notwithstanding that fact, the Court in *Warrior & Gulf* ordered arbitration without deciding the merits of the grievance; the Court left that decisional task to the arbitrator. Thus, even if this case were like *Warrior & Gulf*—and as shown in text it is not—the result reached below still would be the correct one. *See also* pp. —— *infra*.

[7] We do not disagree that the power to reduce forces falls within Article 9's general recognition of "the right of the Company . . . to exercise the functions of managing the business." But AT&T is wrong in asserting that its authority over "the termination of employment" is implicated here. *See* Pet. Br. at 3 & n.3. The Company suggests that Article 1.11 defines termination to include layoffs, *see id.*, but in fact Article 1.11 does the reverse: it defines a layoff to include termination for lack of work. The effect of this definition of "layoff" is to assure that management cannot evade the dictates of Article 20 by labeling an action a "termination" rather than a layoff. But it does not follow that when management acknowledges that it is laying off employees, that such action constitutes a termination; indeed, since laid-off employees retain recall rights, *see* Art. 20, ¶ 7, it is strained to view such individuals as having had their employment relationship terminated.

[8] That same argument could be used to challenge the arbitrability of virtually any grievance raising a question of contract interpre-

Article 9.1 gives the Company the exclusive power to make termination decisions and these are not subject to arbitration except as specifically provided by other provisions of the Contract.

But there is nothing in the contract that limits the Company's right to make a lack of work declaration. . . . Article 20 does not modify the Company's unilateral right under Article 9 to determine when a lack of work condition exists, but only applies when the *order* of layoff is in issue.

* * * *

Conspicuously missing from the Amended Complaint is citation to any specific provision of the Contract which limits or modifies the Company's right to make a lack of work declaration and to effect layoff termination. Instead, the Union merely cited to Article 20, which, by its own terms, does not limit lack of work declarations at all but simply pertains to *order* of layoff decisions. *The Union thus has failed to assert a "colorable claim"* that arbitration is warranted and the Company is therefore entitled to summary judgment. [R. 33, pp. 3-4, 12; last emphasis added.] [9]

tation (as distinguished from contract application). In any case in which the Company disputes the Union's claim that the contract limits management's authority, the Company could assert that the Union is grieving the exercise of a management function. Indeed we are at a loss to understand why AT&T's theory does not apply equally to the grievances the Company has *agreed* to arbitrate that challenge the Company's right to have transferred the Wisconsin and Indiana installers to Chicago. It is the Company's view, as we understand it, that AT&T was free to "simply pick any place [the Company] want[ed]" to transfer those installers. R. 25, p. 16 (Hearing of February 12, 1982). Given that view, under the theory of arbitrability AT&T espouses here the transfer grievances would not be arbitrable since those grievances too, involve what Article 9 denominates a management function, the power to make "placement of Employees." Yet, the Company concedes the arbitrability of the transfer grievances while disputing the arbitrability of the layoff grievance.

Significantly, in its brief to this Court, petitioner refrains from stating any theory as to why the Union's grievance is not arbitrable.

B. AT&T's argument fundamentally misconceives the nature of the "arbitrability" inquiry the courts are empowered to undertake and invites a vast expansion of that inquiry and a concomitant diminution of the preeminent role arbitrators play under the national labor policy.

There was a time when the Company's view of arbitrability—that only claims a court finds "colorable" should be referred to arbitration—had some currency in the decisions of the lower courts. For example, in the leading case of *In re Machinists and Cutler-Hammer, Inc.*, 271 App. Div. 917, 819, 67 N.Y.S.2d 317, 318, *aff'd mem.*, 297 N.Y. 519, 74 N.E.2d 464 (1947), the New York courts held that in deciding whether to order arbitration, it was appropriate for the courts to examine the merits of grievances because "[i]f the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate." But in *American Mfg. Co.*, this Court expressly disapproved of *Cutler-Hammer*,

[9] AT&T made a similar argument in its brief to the court of appeals; after asserting that reducing forces is one of management's functions under Article 9, the Company argued its non-arbitrability position as follows:

> Nothing appears elsewhere in the contract that limits the Company's right to effectuate layoffs when it determines a lack of work situation . . . . Article 20, which is relied upon by the Union as the basis of the Illinois grievance, does *not* purport to modify the Company's unilateral right under Article 9 to determine whether a lack of work exists. The introductory language of paragraph 3 of Article 20, "[w]hen lack of work necessitates layoff," is plainly nothing more than a descriptive phrase that informs the parties when the remaining order of layoff language of Article 20 should be implemented [Br. of Appellant in No. 83-3236 at 31 (7th Cir. 1985); emphasis in original]

explaining that the principle adopted by the New York courts "could only have a crippling effect on grievance arbitration." 363 U.S. at 566-67. The Court went on to define the "very limited" role of the courts in deciding whether to compel arbitration:

> [*The court*] *is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.* In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. . . . [*Id.* at 567-68; emphasis added.]

The *American Mfg. Co.* Court then proceeded to apply these principles as follows:

> The union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to "the meaning, interpretation, and application" of the collective bargaining agreement. Arbitration should have been ordered. *When the judiciary undertakes to determine the merits of a grievance under the guise of interpretating the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.* [*Id.* at 569; emphasis added.]

See also Warrior & Gulf, 363 U.S. at 858 ("[T]he court should view with suspicion an attempt to persuade it to

become tangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause").

The twofold rationale for this careful division of responsibilities between the courts and the arbitrators is carefully developed in *The Steelworkers Trilogy* and has been reaffirmed countless times since. First, the arbitrator has greater competence than a judge to interpret collective bargaining agreements. This is because

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed. [*Warrior & Gulf*, 363 U.S. at 581-82.]

See also, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) ("[T]he specialized competence of arbitrators pertains primarily to the law of the shop"; "[p]arties usually choose an arbitrator because they trust his knowledge and judgment concerning demands and norms of industrial relations").

Second, assuring that arbitrators resolve contract disputes furthers "the basic policy of national labor legislation [which is] to promote the arbitral process as a substitute for economic warfare." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962). As the Court explained in *Warrior & Gulf*, arbitration is a "major factor in achieving industrial peace"; it is "the substitute for industrial strife." 363 U.S. at 578. The Court elaborated:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.
>
> . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of disagreement. [*Id.* at 581.] [10]

Indeed, as the law has evolved subsequent to *Warrior & Gulf*, only if a grievance is subject to arbitration are the courts entitled to enjoin a strike over the grievance. *See Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976). This rule provides added reason to assure that the arbitrability of a grievance is not denied—and economic warfare sanctioned—solely because the grievance appears to a court to be meritless.

Given these dual concerns, it is essential that the sharp line *American Mfg. Co.* draws between jurisdictional issues for the courts and merits issues for arbitrators be preserved inviolate. This is especially so because any time a union and employer differ as to whether their agreement governs a particular realm of management activity, it is a simple matter for the employer to dress up his position as a claim that the employer did not agree to submit its activities in that realm to arbitral review. If such a claim posed a question of arbitrability for the courts to decide—rather than a question of contract interpretation for the arbitrator—"the arbitration clause would be swallowed up by the exception," as the Court cautioned in *Warrior & Gulf*, 363 U.S. at 584. The door to the courts would thus be opened wide to employers in any grievance dispute. And the history of labor-management relations in this country shows that the parties to labor disputes are not shy in accepting such an invitation to litigate where doing so may provide a tactical advantage, without regard to the merit of their litigation position or the adverse effects on the courts' dockets.

[10] *See also, e.g., Bowen v. United States Postal Service*, 459 U.S. 212, 225 (1983); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63 (1981).

The instant case amply demonstrates the extent of this danger. This case has generated a massive record—including eleven affidavits, four depositions, and hundreds of pages of exhibits—and ended up consuming almost two years in the district court alone. This effort was the direct result of the Company's attempt, in the guise of contesting arbitrability to secure a judicial determination of the merits of a contractual dispute, a tactic that disserves national labor policy by bypassing the preferred arbitral forum.

Not surprisingly, in its decisions subsequent to *The Steelworkers Trilogy*, the Court has taken pains to preserve the rule of *American Mfg. Co.* and to order arbitration whenever a claim has been made "which on its face is governed" by an arbitrable provision in the agreement. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), is closest in point. In that case the Court ordered arbitration of a grievance which concerned, among other things, whether a collective bargaining agreement created rights which continued after the agreement itself expired; the Court overruled the employer's contention that he had not agreed to arbitrate disputes with respect to conduct occuring after the agreement ended, explaining: "Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully de-

[11] *Accord, Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U.S. 243 (1977). *John Wiley* also requires arbitration of issues of "procedural

veloped facts." *Id.* at 555.[11] *See also Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487 (1972) (arbitration ordered in the face of an employer's claim that there was no agreement to arbitrate disputes which were barred by laches; the Court treated the claim as one for the arbitrator in deciding the merits of the dispute and not as a genuine issue of arbitrability).

Similarly, in the instant case, the question whether Article 20 constrains management's power to reduce forces at one base in order to create vacancies for employees from another base is not a jurisdictional question. The only jurisdictional question is whether the arbitrator is empowered to decide what Article 20 means. And there can be no doubt that the arbitrator has jurisdiction over the grievance here given that (i) the Union's claim "on its face is governed by [Article 20] of the contract," *American Mfg. Co.*, 363 U.S. at 567; (ii) Article 8 authorizes the arbitrator to resolve "differences arising with respect to the interpretation of this contract"; and (iii) nothing in the contract excludes disputes under Article 20 from the arbitral process.

This does not mean, as AT&T seems to believe, that an arbitrator necessarily will be determining when a layoff is justified.[12] As previously noted, as a general rule

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arbitrability," even though an employer's claim that a union failed to follow the proper steps of the grievance procedure could easily be viewed as a claim that the employer did not agree to arbitrate grievances that were not properly processed.

[12] The fact that AT&T views the only alternatives here as either denying the arbitrator jurisdiction or providing for arbitral review of management's decision to reduce forces shows how thoroughly the Company blurs jurisdictional and merits issues. Particularly revealing are the following two sentences from the Company's brief:

> [A] ruling that would affect employers' ability to exclude from arbitration the dispute over whether layoffs were justified by a lack of work is, of itself, an extraordinary proposition. Absent explicit language to the contrary, arbitrators simply do not determine whether a layoff was justified by a lack of work, but confine their decisions to whether seniority and other provisions were followed in the layoff. [Pet. Br. at 11-12, n.11.]

AT&T thus sees the fact that arbitrators generally "do not determine whether a layoff was justified" as proof that it would be "extraordinary" to sustain jurisdiction here. But the one statement has nothing to do with the other; if arbitrators do not review the justification for layoffs it is because arbitrators have concluded, pursuant to their jurisdiction to interpret collective bargaining agreements, that such agreements do not substantively limit management's freedom to reduce forces. Indeed, the very arbitration decisions AT&T cites immediately following the above-quoted sentences to prove that arbitrators "do not determine whether a layoff was justified" are decisions which rest on the merits of contract disputes and *not* on findings of non-arbitrability.

Equally revealing are the following sentences from the Company's statement of the case:

> In the District Court, the Union and the Company each recognized that the District Court had a duty to determine whether the arbitrator's jurisdiction extends to disputes over whether there had been a lack of work justifying a layoff. . . .
>
> At no time did either party present evidence on the question whether there was in fact sufficient work. Nor did they otherwise litigate the merits of the underlying lack of work dispute. In short, both sides recognized that the issue of arbitrability was for the District Court, and both sides proceeded accordingly. [Pet. Br. at 4-5.]

Implicit in this passage is the notion that "the question whether there was in fact sufficient work" is a merits question for arbitration, whereas the question whether Article 20 "extends to disputes over whether there had been a lack of work" is a jurisdictional issue for the courts. Nothing in *The Steelworkers Trilogy* supports that cramped view of the arbitrator's role—in essence that arbitrators are to resolve factual disputes but are not to interpret contracts—or that expansive view of the courts' role.

Ironically, in both the district and appellate courts, AT&T relied upon dicta contained in a prior arbitration award between the parties (R. 58. Ex. 14 at 8-10) in support of its contention that an arbitrator could not resolve this dispute. *See* Br. of Appellant in No. 83-3236 at 16-17. To the extent that the Company has relied upon an award of a prior arbitration, it has conceded the

employers enjoy the freedom to manage the workplace except to the extent that the employer is bound by contrac-

tual limitations on that freedom. Accordingly, if AT&T's view that Article 20 imposes no constraint on management's power to reduce forces at a particular base proves correct, AT&T will be entitled to have the Union's grievance denied by the arbitrator for failure to state a valid claim and without any inquiry into the question of how many employees the Company should employ at its Chicago base. In that event, AT&T's asserted aim of "exclud[ing] from review by arbitrators' various "fundamental business decisions—such as when to layoff employees," Pet. Br. at 11—would be achieved. But the arbitrator would refuse to review such decisions not because of a lack of jurisdiction, but because, *in the exercise of his jurisdiction*, the arbitrator determines that the contract contains no limits on management's business decisions in this regard.[13]

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jurisdiction of an arbitrator to interpret the disputed contractual provisions. If an arbitrator has already issued a ruling contrary to the Union, the Company can hardly claim that another arbitrator does not have jurisdiction to address the same issue. *See W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983).

[13] In the court below, in an attempt to bolster its non-arbitrability claim, AT&T pointed to several pieces of extrinsic evidence that the Company claimed prove an intent to exclude grievances like the instant one from arbitration; AT&T briefly summarizes that evidence in its brief to this Court (at 4-5). That evidence provides no support for the Company and, indeed, further demonstrates that the Company is arguing the merits in the guise of contesting arbitrability.

AT&T bases its argument on *In re Arbitration Between Western Electric Co. and Communications Workers*, 304 N.Y. 578, 107 N.E.2d 76 (1952), which held that under a predecessor to the contract at issue here, a grievance over the suspension of a group of employees who had engaged in a work stoppage was not arbitrable. That earlier contract contained no provision governing disciplinary suspensions; the Union argued that a provision in the contract that authorized the Company in the event of a work stoppage to cease withholding union dues from employees' wages and remitting such dues to the union constituted the exclusive remedy available to management for such work stoppages and pre-

C. Even if, contrary to what we have just shown, the dispute between the Company and the Union over the meaning of Article 20 were somehow relevant to determining the arbitrator's jurisdiction over the instant grievance, the court below still reached the correct result in ordering arbitration. For as we proceed to show, in that event, *Warrior & Gulf*, rather than *American Mfg. Co.*, would be the governing precedent, and *Warrior & Gulf* requires arbitration where, as the court below found to be true here, "there are colorable arguments both for and against exclusion" of the grievance from arbitration. Pet. App. 7A.

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cluded disciplinary action against the offending employees. Relying on the earlier decision of the New York courts in *Cutler-Hammer*, the court in *Western Electric* felt free to examine the merits of the union's grievance and concluded that the union's theory was "untenable." J.A. 34. Based on that conclusion the court held that the grievance was not arbitrable, relying in part on the management functions provision of the contract.

Following this decision, the parties in their negotiations addressed the issue of employer discipline and negotiated a new Article 22 to deal with that subject; this is the bargaining history to which petitioner averts. The focus of those negotiations was on the question: what substantive limitations should be placed on management's discretion to discipline and which of those substantive limits should be excluded from arbitration. (Absent an exclusion, any limitation would be enforceable in arbitration pursuant to Article 8.) The parties did *not* address the discrete question of whether Article 20 placed limits on management with respect to layoffs—a question that was not raised or decided in *Western Electric*. And at no time did the parties agree to the propriety of the since-discredited general approach to arbitrability followed in *Western Electric*, *i.e.* excluding from arbitration any grievance which rested on a legal theory a court found to be untenable.

In sum, neither *Western Electric* nor the bargaining that followed that decision provides AT&T with any comfort. And the Company's reliance on that decision further confirms that here—as in *Western Electric*—the arbitrability argument is actually nothing more than a disagreement over the merits of the theory underlying the Union's grievance.

AT&T discusses *Warrior & Gulf* at some length, but focuses on only one of the two holdings of that decision. There is no doubt, as the Company argues, that *Warrior & Gulf* teaches that "the question of arbitrability is for the courts to decide," 363 U.S. at 587, n.7. But what AT&T fails to acknowledge is that *Warrior & Gulf* also prescribes a substantive rule of decision for the courts to apply in deciding when to compel arbitration: arbitration is to be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." 363 U.S. at 582-83. This is what has become known as the "presumption of arbitrability of labor disputes." *Gateway Coal Co. v. Mine Workers*, 414 U.S. 318, 377 (1974).

The rationale for this "strong presumption," *Nolde Bros. Inc. v. Bakery Workers*, *supra*, 430 U.S. at 254, is precisely the same as the rationale for the rule of *American Mfg. Co.* See pp. 17-19, *supra*. The presumption recognizes the greater institutional competence of arbitrators in interpreting collective bargaining agreements; protects the courts from being used for tactical advantage by parties to a labor dispute; and perhaps most important of all, the "presumption furthers the national labor policy of peaceful resolution of labor disputes," *Schneider Moving & Storage Co. v. Robbins*, —— U.S. ——, 52 L.W. 4476, 4478 (April 18, 1984).

In light of the presumption of arbitrability, the court below in requiring arbitration here reached the only possible result. For that court's findings establish that this case falls squarely within the *Warrior & Gulf* rule:

> In this case, Article 8 is a standard arbitration clause, providing for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder." Furthermore, there is no clear, unambiguous exclusion from arbitration of terminations predicated by a lack of work determination. *Rather, there are colorable arguments both for and against exclusion, both of which require interpretations of less than clear substantive provisions.* [Pet. App. 7A; emphasis of all but penultimate word added.]

Indeed, the instant case not only falls within the rule of *Warrior & Gulf* but is analytically indistinguishable on its facts (assuming, still, that this is a case in which the dispute over the merits is relevant to determining the arbitrator's jurisdiction). Like this case, *Warrior & Gulf* involved a dispute over whether a particular area of management activity—there, contracting out—was limited by a collective bargaining agreement. The agreement in *Warrior & Gulf* contained no express language limiting management's perogatives in that regard; the Union claimed that such limitations were implicit in the prohibition of lockouts as well as in other provisions of the contract. The employer disagreed, asserting that the contract imposed no constraint on management's discretion in subcontracting, and that the union's grievance, therefore, involved nonarbitrable management rights.

Faced with this dispute as to whether contracting out was a management function—and faced with a contract which excluded from arbitration grievances over management functions—the *Warrior & Gulf* Court did precisely what the court of appeals did in the instant case: ordered arbitration *without deciding which parties' interpretation of the contract is correct* because it could not "be said with positive assurance" that the contract is "not susceptible of an interpretation" under which the grievance would be arbitrable. This Court explained:

> [T]he court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even though the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.

> The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts. [363 U.S. at 585] [14]

Thus, even if, as AT&T contends, the collective bargaining agreement at issue here included an arbitral exclusion like the one involved in *Warrior & Gulf*, the result that obtained in *Warrior & Gulf* would equally obtain here: an order compelling arbitration would be required.

II. The Holding Below, Which Need Not Be Reached By This Court, That An Order Compelling Arbitration Is Not Determinative Of The Arbitrator's Jurisdiction Is Correct

Had the court below done no more than direct arbitration on either of the two theories set forth in Part I of this brief the dispute here would have generated a thoroughly uneventful case. But the court of appeals went further: that court also directed the arbitrator to address the "arbitrability" issue in the ensuing arbitration. It is this aspect of the decision below that gives rise to AT&T's incessant complaint that the court of appeals abdicated its judicial responsibilities and transferred those responsibilities to the arbitrator.

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[14] As previously noted, the collective bargaining agreement in *Warrior & Gulf*, unlike the agreement here, contained a provision which expressly excluded from arbitration grievances posing "[i]ssues which . . . are strictly a function of management"; thus the employer in *Warrior & Gulf* presented an unusually weighty argument for the Court to determine whether under that collective bargaining agreement contracting out was a "function of management." That the Court resisted doing so in *Warrior & Gulf* demonstrates just how strong is the rule against judicial determination of merits issues, even where those issues are intertwined with issues of arbitrability.

Because, as we have shown, the court of appeals acted properly in ordering arbitration, this Court need not consider here the further question of whether the court below should have foreclosed the arbitrator from considering the arbitrability question anew. Any error that the lower court made in this regard prejudiced only the Union and not the Company, and the Union has not raised any complaint. Nonetheless, we recognize that having granted certiorari in this case, the Court may wish to address this aspect of the court of appeals' reasoning and we therefore turn to a demonstration that the approach taken by the court below is sound.

To understand this portion of the lower court's opinion, it is necessary to return to the twin holdings of *Warrior & Gulf*. *See* p. 24, *supra*. On the one hand, *Warrior & Gulf* states that "the question of arbitrability is for the courts to decide," 363 U.S. at 583 n.7; on the other hand *Warrior & Gulf* holds that the courts are to order arbitration when the parties' agreement is "susceptible of an interpretation" that would make arbitration appropriate, *id.* at 582-83. If the first of these two statements—that "arbitrability is for the courts to decide"—were read to mean that before deciding to compel arbitration a court must decide whether the parties in fact intended that the particular grievance in question be decided on the merits by the arbitrator, the two rules of *Warrior & Gulf* would be in irreconcilable conflict. For if this Court, in reserving "arbitrability" for judicial determination, intended to have federal courts make a final determination on what the arbitration clause means, the rule that a judicial order to arbitrate should issue whenever the arbitration clause is "*susceptible*" of an interpretation that warrants arbitration would make no sense.

There is, of course, an option other than reading the two parts of *Warrior & Gulf* in a manner that creates an internal conflict. That option is to view the term "arbitrability," as it is used in *Warrior & Gulf*, as simply a

short-hand statement of the requisite judicial determination for directing arbitration: *viz.*, that the parties have agreed to an arbitration procedure and that it is arguable that a particular grievance falls within that procedure. Of course, this is not the *only* possible meaning of "arbitrability"; in a related context, that word has an entirely different and natural meaning: as used by an arbitrator, "arbitrability" is a short-hand statement of the finding that the collective bargaining agreement authorizes the arbitrator to reach the merits of a grievance.[15] But for the reasons just stated, *Warrior & Gulf* cannot be fairly read to require the courts to decide "arbitrability" in this latter sense.

It thus would appear that *Warrior & Gulf* teaches that when a court considers "arbitrability" the court's task is to determine whether the arbitrator *has jurisdiction to decide his jurisdiction over the grievance* and when an arbitrator considers "arbitrability" his task is to determine whether he *in fact has jurisdiction over the grievance.*[16] That this is the proper reading of *Warrior & Gulf* is confirmed by this Court's recent decision in *W.R.*

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[15] Of course, when an arbitrator decides arbitrability, the "policy in favor of arbitration may color interpretation of the contract," *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219 (1979); because arbitration "furthers the national labor policy of peaceful resolution of labor disputes" it "best accords with the parties' presumed objectives in pursuing collective bargaining." *Schneider Moving & Storage Co. v. Robbins, supra*, 52 L.W. at 4478.

[16] There is a third—and looser—sense in which the word "arbitrable" may be used in labor relations parlance. If an arbitrator concludes that the substantive provisions of a contract do not cover a particular area—in this case, for example, if the arbitrator were to find that the contract does not limit management's discretion to reduce forces—the arbitrator might state that, as a consequence of this determination, a grievance over management activity in this area does not raise an arbitrable issue. In this context, the term "arbitrable" is not being used in any jurisdictional sense, but as a statement of a ruling on the merits of a grievance.

Grace, supra. There the Court stated: "Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, *the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator.*" 461 U.S at 765 (emphasis added). Thus, *W.R. Grace* makes clear that courts are not to decide "the scope of the arbitrator's authority" and that the "arbitrability" issue courts resolve under *Warrior & Gulf* is a more limited issue than the "arbitrability" issue arbitrators resolve.[17]

This understanding explains the practice that has grown up since *Warrior & Gulf* under which arbitrators decide "arbitrability" after a court has directed arbitration. That practice can be traced to *Warrior & Gulf* itself, as in that case the arbitrator, following this Court's decision, took it upon himself to consider the arbitrability question and reached the merits of the grievance only after first finding the grievance to be arbitrable. *Warrior & Gulf Navigation Co.*, 36 Lab. Arb. 695, 696-99 (Holly 1961). Other arbitral decisions are in accord.[18] And the courts of appeals consistently have upheld the authority

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[17] The fact that a court may compel arbitration without resolving a dispute over the arbitrator's jurisdiction is not inconsistent with the principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U.S. a 582. For once a court finds that an arbitration clause is "susceptible of an interpretation" that would cover a particular grievance, the court necessarily has found that there is a disagreement over the meaning of the arbitration provision. And so long as it recognized that "the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator," *W.R. Grace, supra*, 461 U.S. at 765, arbitration may be ordered in accordance with the parties' intent.

[18] *E.g., Lin-Rol Industries*, 81 Lab. Arb. 31, 38-39 (Mikrut 1983); *Bunn-O-Matic Corp.*, 70 Lab. Arb. 34, 37-38 (Talent 1977).

of arbitrators to decide arbitrability following a court decision compelling arbitration.[19]

The reasons that the arbitrators have, with court approval, so ruled and have considered arbitrability issues even though *Warrior & Gulf* states that "arbitrability is for the courts," are those we have developed above: arbitrators and judges have recognized, explicitly or implicitly, that the term "arbitrable" is used in this area of the law in two different senses. A judicial determina-

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[19] *Camden Industries Co. v. Carpenters Local Union No. 1688*, 353 F.2d 178 (1st Cir. 1965); *A.S. Abell Co. v. Baltimore Typographical Union No. 12*, 338 F.2d 190, 194-95 (4th Cir. 1964); *Oil, Chemical & Atomic Workers v. American Petrofina*, 759 F.2d 512, 515 (5th Cir. 1985); *Salary Policy Employee Panel v. Tennessee Valley Authority*, 731 F.2d 325, 331-333 (6th Cir. 1984). *See also Rochdale Village Inc. v. Public Service Employees*, 605 F.2d 1290, 1295-96 (2d Cir. 1979); *Local 103, Int'l. Union of Electrical Workers v. RCA Corp.*, 516 F.2d 1336, 1340-41 (3d Cir. 1975); *Local 4, Int'l. Broth. of Electrical Workers v. Radio Thirteen-Eighty, Inc.*, 469 F.2d 610, 614-615 (9th Cir. 1972).

This Court's opinion in *John Wiley, supra*, lends further support to the appellate court decisions just cited. As part of its explanation for the holding that issues of procedural arbitrability should be reserved for arbitrators, this Court explained that under a contrary rule, in which procedural issues would be decided by federal courts in § 301 actions, the arbitrator still "would ordinarily remain free to reconsider the ground covered by the court insofar as it bore on the merits of the dispute, using the flexible approaches familiar to arbitration." 376 U.S. at 558.

In *Nolde Brothers*, the lower court decision that was brought to this Court for review stated that "where a clause in a labor contract purporting to exclude some matters from arbitration is vague and ambiguous . . . an arbitrator may be expressly empowered to not only adjudge grievances, but also to decide whether the instrument gives him the power to do so." *Local 358, Bakery Workers v. Nolde Brothers*, 530 F.2d 548, 552 (4th Cir. 1975). But because "[c]ertiorari was neither sought nor granted on the question of the arbitrator's authority to consider arbitrability following referral," this Court's "express[ed] no view on that matter." 430 U.S. at 255 n.8.

tion that a grievance is "arbitrable" establishes only that the governing agreement is "susceptible of an interpretation" authorizing arbitration of grievance and thus that a court order of arbitration is warranted. But that determination cannot be conclusive of the question whether that *possible* interpretation of the agreement is the *proper* one, *i.e.* whether the grievance is "arbitrable" in the arbitrator's sense.

When all is said and done, then, the court of appeals in the instant case did no more than follow the settled practice under which arbitrators decide questions of "arbitrability" after a court orders arbitration. The only difference between the decision below and the decisions of the numerous other courts of appeals cited at p. 30, n.19, is the form of words the appellate court used here to express its conclusion: that court viewed the word "arbitrable" to have a single meaning—that the arbitrator does in fact have jurisdiction to decide the underlying grievance—and the court of appeals, recognizing that its decision could not be determinative of the arbitrator's jurisdiction, declined to use the word "arbitrable" as a short-hand statement of its finding that an order sending this matter to the arbitrator is warranted.

The locution the court below used to state its determination—*viz.*, its statement that arbitrability is for the arbitrator—if adopted by this Court, could lend greater clarity to this area of the law by eliminating the ambiguity inherent in the word "arbitrable". Thus, if the Court were to reach this issue, we submit that it would aid analysis in suits to compel arbitration under § 301 (i) to reaffirm the *Warrior & Gulf* test ("susceptible of an interpretation . . .") as to when arbitration should be required; (ii) to make explicit that a direction of arbitration under that test is not conclusive of the arbitrator's jurisdiction over the grievance; and (iii) to excise the chameleon-like term "arbitrability" from the language of § 301 law.

CONCLUSION

For the foregoing reasons, the judgment directing arbitration should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

PLAINTIFFS' COMPLAINT, EXHIBIT "C"

LOCAL NO. 5090

Job Location: Various; Date: 1/18/82; Town: Various; State: Illinois; Time and Date of Occurrence: 1/15/82; Date Reported: 1/15/82; Name of Member or Members Involved: All involved installers; Date Presented to Manager: ————; Name of Manager: James J. McGettigan; Service Date: Various; Rate of Pay: Various; Contract Article Involved: 8, 9A, 20.

NATURE OF GRIEVANCE: On 1/15/82 the Company notified the Union of their intention to permanently transfer 48 installers to the Illinois Area. Since the Company has procrastinated and delayed a pending grievance concerning an unjustified layoff of Illinois installers the Union views this notification, and attempt, to permanently transfer installers into the Illinois Area as a further violation of the contract.

DEMAND FOR SETTLEMENT:

Immediately rescind the notification, and attempt, to permanently transfer installers into the Illinois Area.

STATEMENT OF SUPERVISOR:

STATEMENT OF UNION:

Grievance is justified, and if not settled should be referred.

Settled Satisfactorily — yes —no

Date referred to higher levels of grievance procedure ————

Signed _____ /s/ John A. Smykowski
Member(s)
Steward Officer
JOHN A. SMYKOWSKI
President
CWA Local 5090

Note 1: Use additional forms or blank paper, if space is not sufficient.

Note 2: All other levels of grievance procedure, please note dates of meetings and other referrals on rear of this form.

PLAINTIFFS' COMPLAINT, EXHIBIT "D"

LOCAL NO. 5090

Job Location: Various; Date: January 19, 1982; Town: Appleton, Eau Claire, Fond Du Lac, Green Bay, Madison, Stevens Point; State: Wisconsin; Time and Date of Occurrence: January 15, 1982; Date Reported: January 15, 1982; Name of Member or Members Involved: C. J. Nikolaus on behalf of all installers notified of Permanent Transfer; Date Presented to Job Supervisor: January 19, 1982; Name of Supv: W. T. Wasburn; Service Date: Various; Rate of Pay: Various; Contract Article Involved: 9 A & 20.

NATURE OF GRIEVANCE:

COMPANY'S FAILURE TO UTILIZE ARTICLE 20 AS BASIS FOR PERMANENT TRANSFERS.

DEMAND FOR SETTLEMENT:

UTILIZATION OF ARTICLE 20 AS BASIS FOR DETERMINING PERMANENT TRANSFER LOCATIONS.

STATEMENT OF SUPERVISOR:

JOB STEWARD'S STATEMENT:

THE UNION FEELS THAT IF ARTICLE 20 WERE ACKNOWLEDGED AS THE TRUE BASIS FOR THE PERMANENT TRANSFERS A WIDER RANGE OF PERMANENT TRANSFER LOCATIONS WOULD BE AVAILABLE TO THE EMPLOYEES.

Settled Satisfactorily — yes —no

Date referred to higher levels of grievance procedure ————

Signed ————————————/s/ ————————————
Member(s) Steward-Officer

Note 1: Use additional forms or blank paper, if space is not sufficient.

Note 2: All other levels of grievance procedure, please note dates of meetings and other referrals on rear of this form.

PLAINTIFFS' COMPLAINT, EXHIBIT "E"

GRIEVANCE RECORD

LOCAL NO. 5790

Job Location: All; Date: January 19, 1982; Town: ————; State: Indiana; Time and Date of Occurrence: Jan. 15, 1982; Date Reported: Jan. 15, 1982; Name of Member or Members Involved: Class Action—see attached list; Date Presented to Job Supervisor: ————; Name of Supv: J.J. McGettigan; Service Date: ———; Rate of Pay: ————; Contract Article Involved: 9A—20—13.

NATURE OF GRIEVANCE:

On 9/25/81 the Illinois and Michigan Installation Division of the W.E. Co laid off large numbers of installers. (43 in Mich.) This force adjustment was a planned method of providing room for Indiana and Wisc. Installers. At the outset, Ind. and Wisc. installers (approx. 40 Installers from each State) were Temporary Transferred into the Chicago and Metro area of Illinois. Michigan also received Temp. Transfers, however at a much lower rate. Many thousands of dollars were spent providing living allowances for the Installers who were on transfer.

Thousands more was sent for layoff allowances for those installers sacrific in Ill. and Mich. It is our feeling that the W.E. Co. has no right to cause a lay-off in one Company Installation Area to provide work locations for Installers from another Installation Area. Not when the Co. was hiring in other parts of the Country and working massive overtime. No lay-offs should have occurred in Ill. or Mich. for the purpose of making room. Art. 20 states "when lack of *work* necessitates a Lay-Off. This was not the case in either Ill. or Mich.

On Jan. 15, 1982 Indiana announced 22 Forced Permanent Transfers and Wisc. to Chicago Base of Ill. We contend that because of Indiana's seniority (all Installers over 10 yrs. service) that if work locations had to be found for them on either Temp. or Perm. Transfers then they should have been sent to Company Areas where work exists.

DEMAND FOR SETTLEMENT:

Perm. Transfers were necessary, the transfers should be to Company Areas where work exists. They should not be used to fill a vacuum caused by the layoff of Installers by the Co. without regard to so called lack of work. The 22 Permanent Transfers to Illinois should be cancelled.

STATEMENT OF SUPERVISOR:

JOB STEWARD'S STATEMENT:

The demands are justified.

Settled Satisfactorily — yes —no

Date referred to higher levels of grievance procedure ————

Signed ———————————— /s/ [Illegible]
Member(s) Steward-Officer

Note 1: Use additional forms or blank paper, if space is not sufficient.

Note 2: All other levels of grievance procedure, please note dates of meetings and other referrals on rear of this form.

PLAINTIFFS' COMPLAINT, EXHIBIT "F"

LOCAL NO. 5790

Job Location: New Albany, Vincennes and Evansville, Indiana; Date: January 22, 1982; Town: (See above); State: Indiana; Time and Date of Occurrence: 1/15/82 —2 P.M.; Date Reported: 1/15/82; Name of Member or Members Involved: See Below; Date Presented to Job Supervisor: N/A; Name of Supv: J. J. McGettigan, Manager; Service Date: N/A; Rate of Pay: N/A; Contract Article Involved: Article 9A, Article 13, Par. 2.91.

NATURE OF GRIEVANCE:

On January 15, 1982 Western Electric Company notified 22 Indiana based Installers of permanent transfers to the Chicago, Illinois base effective February 15, 1982. Four of the 22 to be permanently transferred would be transferred outside the Contract provisions, if they are indeed transferred because they are 4 index Installers, with no communications systems qualification.

DEMAND FOR SETTLEMENT:

Cancel permanent transfer schedule for:

E. E. Meek
R. J. Daly
A. D. Bigler
J. E. Sights

Provide proof that these four are qualified in a communications system.

Provide proof that more Installers trained in work operation Code 432 are needed in Chicago, Illinois.

STATEMENT OF SUPERVISOR:

JOB STEWARD'S STATEMENT:

The demand is justified:

Settled Satisfactorily — yes —no

Date referred to higher levels of grievance procedure ————

Signed ————————————/s/ ————————————
Member(s) Steward-Officer

Note 1: Use additional forms or blank paper, if space is not sufficient.

Note 2: All other levels of grievance procedure, please note dates of meetings and other referrals on rear of this form.

REPLY

BRIEF

Supreme Court, U.S.
FILED
JAN 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1913

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1985

AT&T TECHNOLOGIES, INC.,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA
and its LOCAL 5090,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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No. 84-1913

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1985

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Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA AND ITS LOCAL 5090,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER[1]

The parties and the *amici* are in complete agreement on the answer to the only question presented in this case. There can be no "exception" to the "general rule" requiring a judicial determination of arbitrability. The Seventh Circuit erroneously held (Cert. Pet. App. 7A) that a court should refuse to make this determination if the labor agreement has not "clearly excluded the arbitrability issue from arbitration" and a decision on arbitrability would require interpretation of exclusionary language outside a "standard arbitration" clause. As Respondents' Brief ("CWA Br.") concedes, there is "no doubt that 'the question of arbitrability is for the courts to decide.' " CWA Br. 24 (citations omitted).[2]

[1]The Statement Required By Rule 28.1 appears at p. ii of the Petition for Certiorari.

[2]CWA also affirmatively points out that there are cases—*United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) was one—where courts must "evaluate the merits of the grievance" to determine arbitrability (CWA Br. 12 n.6), so there is no question that the merits of a grievance are implicated when courts determine arbitrability.

The *amicus* brief of the National Academy of Arbitrators ("Academy") that supports respondents is even more explicit; it states that the Seventh Circuit's exception not only is error but is "dangerous" to national labor policy. Academy Br. 26.

Thus, it is undisputed that the Court of Appeals applied an erroneous legal standard and did not provide AT&T with the judicial determination of arbitrability to which it was entitled. In this circumstance, both orderly procedure and the practice of this Court dictate that the case be remanded for application of the correct legal standard. *United States* v. *Rutherford*, 442 U.S. 544, 559 n. 18 (1979); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 271 (1977). This case can and should be decided by reaffirming that there is no "exception" to the general rule of the *Steelworkers' Trilogy* and remanding the case for the judicial determination of arbitrability that is required by the *Steelworkers' Trilogy*.

However, CWA and the Academy each contend that the Court may and should affirm the Court of Appeals' judgment on alternative grounds that were not decided below, not presented in the Petition for Certiorari, and concededly (CWA Br. 15) not addressed in Petitioner's Brief. Indeed, CWA devotes the first 26 pages of its brief to arguing that the Seventh Circuit's specific holding need not be reached.

CWA appears to reason (p. 24) that the Seventh Circuit somehow, *sub silento*, evaluated the evidence and made findings that establish that the instant layoff dispute was arbitrable under the "correct" legal standards. Alternatively, CWA, joined by the Academy (Academy Br. 7-26), acknowledges that while the requisite findings were not made by the lower courts, this Court should evaluate the evidence and make these findings itself, under legal standards urged for the first time in this Court. On these bases, CWA also urges (27-31) that the Court may affirm the Seventh Circuit in its entirety by holding, first, that arbitration

was properly ordered and, second, that the Seventh Circuit's order that "arbitrability be arbitrated" was a "novel formulation" for the propositions that arbitrators should decide "arbitrability" in a different "sense" than do courts and that the term arbitrability should be "excise[d] from the language of the law under § 301." CWA Br. 26-31.

There is no substance to the arguments that the case should now be decided on these alternative grounds.

I. The Seventh Circuit Has Neither Expressly Nor Impliedly Discharged Its Obligation To Determine Arbitrability.

CWA appears (p. 24) to argue that the judgment can be affirmed on the ground that the Seventh Circuit impliedly made findings that establish that the instant layoff dispute is arbitrable under established legal standards. This argument rests, however, on an obvious mischaracterization of both the theory under which AT&T has argued that this dispute is excluded from arbitration and the lower courts' decisions. In this respect, CWA (Br. 9-26) makes the extraordinary assertion, refuted by Petitioner's Brief (p. 22), that AT&T has sought to revive the so-called doctrine of *Cutler-Hammer* and have the instant layoff dispute excluded from arbitration on the ground that CWA's interpretation of Article 20 is meritless. See CWA Br. 9, 15-16. This is simply incorrect.

AT&T's claim has always been that the parties' agreement excludes the Company's decisions whether to lay off workers from review by arbitrators, *regardless* of the merits of a Union claim that the layoff violated Article 20 or any other contract provisions. Specifically, the Company introduced evidence showing that the prior judicial interpretations of Articles 8 and 9 established that all termination disputes (defined to include layoffs by Article 1.11) had been excluded from arbitration prior to 1953 and that the subsequent bargaining history showed that the parties thereafter continued to agree that Article 9 of the Agreement

excluded the Company's layoff decisions from arbitration, whether or not the layoff could be alleged to have violated some provision of the contract.[3] AT&T's theory, in short, was that this evidence showed that there was, in effect, a "collateral agreement" between the parties, or other equally "forceful evidence," that grievances over the decision to order a layoff had been excluded from arbitration by Article 9, which unequivocally withholds termination decisions from arbitration.[4] Under the decisions of this Court and the uniform holdings of courts of appeals, there is no question that arbitration could not have been ordered if the lower courts had agreed with AT&T's evidentiary claims. See, *e.g., United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960); *Communications Workers* v. *Pacific Northwest Bell Telephone Co.*, 337 F. 2d 455 (9th Cir. 1964); Petitioner's Br. 17-20.

Indeed, CWA's claims that AT&T's arguments are insubstantial or illegitimate as a matter of law are startling, for CWA previously acknowledged that AT&T's evidence was sufficient to rebut the "presumption of arbitrability." When AT&T presented its argument in a summary judgment motion in the District Court (on the day AT&T filed its answer to CWA's complaint, see R. 31-33), CWA resisted a speedy resolution of the claim as a

[3]The history shows that the only grievances that might be arbitrated, in contrast, involved the Company's determination of *how* a layoff decision, once made, was implemented: that is, the order in which employees would be laid off. However, CWA's claim in the instant grievance is that no layoff should have been ordered (CWA Br. 3), and it is challenging the decision *whether* to order a layoff. In contrast, the grievances that AT&T agreed to arbitrate each involved implementation of AT&T's layoff decision. See CWA Br. 4.

[4]This evidence also shows that this is one of the cases, like *Warrior & Gulf* (see CWA Br. 12 n.6), in which the determination of arbitrability could require interpretations of "substantive" contract provisions. It is for this reason, and this reason only, that there were also discussions of Article 20's meaning in the briefs filed in the District Court. See CWA Br. 13-14.

matter of law. Instead, it initiated 15 months of discovery to investigate the bargaining history and other parol evidence, thus acknowledging the relevance and sufficiency of AT&T's evidence. See R. 34, Plaintiffs' Motion To Take Discovery And To Hold Briefing Schedule On Defendant's Motion For Summary Judgment In Abeyance (filed Aug. 25, 1982).[5]

Against this background, there is no substance to CWA's contention (p. 24) that the District Court and Court of Appeals made "findings" that implicitly rejected AT&T's claims under the standards of *Warrior & Gulf*.[6] Because both courts refused to construe the exclusionary language of Article 9 in light of the "extensive parol evidence regarding bargaining history and prior litigation between the parties" (752 F.2d at 207; Cert. Pet. App. 8A), neither court addressed AT&T's showing that there was a "collateral agreement" and other "forceful evidence" of a purpose to exclude the instant layoff dispute from arbitration; nor did they decide whether Article 9's exclusion of termination decisions from arbitration was effective for that purpose. Compare *Warrior & Gulf*, 363 U.S. at 584-85. Both courts "avoided consideration of" this evidence of intent on the ground that AT&T's claims fell

[5]CWA's suggestion (p. 19) that employers can or do seek to litigate arbitrability issues to obtain delays and tactical advantages is not only contrary to the facts of this case, but also is refuted by the actual experience under the *Steelworkers' Trilogy*. While the statistics of the American Arbitration Association and the Federal Mediation and Conciliation Service (which excludes the large numbers of arbitrations not processed by these services) show that there were more than 28,000 arbitrations instituted each year between 1982 and 1984 (see the Appendix to this Reply Brief), Petitioner's review of the Labor Relations Reference Manual, which is published by the Bureau of National Affairs, during those years reflects that there were fewer than 30 reported judicial decisions ruling in suits to compel, or to stay, labor arbitration in each of those years.

[6]If the lower courts had made such "findings" there would have been no need for the Court of Appeals' candid statement that its decision "is difficult to reconcile with the Supreme Court's discussion of a court's duty to decide arbitrability in *Wiley* . . . ." 752 F.2d at 206; Cert. Pet. App. 4A-5A.

within an "exception" that eliminated any need for a judicial determination of arbitrability. 752 F.2d at 207; Cert. Pet. App. 8A.[7]

Thus, CWA's and the Academy's arguments that there are different "senses" in which the term "arbitrability" is used, or misused, by arbitrators are quite beside the point. Regardless of whether the term has one, two, three or four "senses,"[8] the decisive fact is that the Seventh Circuit did not make the judicial determination of arbitrability that all concede is required before a reluctant party can be judicially compelled to arbitrate a labor dispute: it did not decide whether the parties' total agreement was susceptible to an interpretation in which grievances over the ordering of a layoff are subject to arbitration and that there was not a "clear purpose" to exclude the dispute from arbitration. See *Warrior & Gulf, supra*, 363 U.S. at 584-85; Petitioner's Br. 15-20.

CWA's argument (p. 31) that the Court should "clarify" the law by "excis[ing]" the term " 'arbitrability' from the language of § 301 law" is not necessary to the decision of this case. It is also a bad idea. The term has been given content in 25 years of decisions by this Court and other courts and there is no indication that it has disserved any objective of the labor laws. To promote the objectives of Section 301, all this Court need do is reaffirm the standards of the *Steelworkers' Trilogy* and its progeny. This is especially so because some of CWA's alternative formulations of the judicial task under Section 301 conflict with both this Court's explicit holdings and the purposes of our labor laws.[9]

[7]In claiming that the Seventh Circuit found the dispute arbitrable, CWA quotes, out of context, the Seventh Circuit's explanation of why this case falls within this "exception." CWA Br. 24.

[8]Compare CWA Br. 26-31, with Academy Br. 20-24 (collectively referring to four different meanings).

[9]For example, CWA states, at one point (Br. 28), that the judicial task should be redefined as a determination whether the arbitrator "has jurisdiction to decide his jurisdiction over the agreement," in the same sense

(Footnote continued on next page)

II. This Court Should Decline The Invitation To Decide The Arbitrability Issue Now, Under New Legal Standards.

Ultimately, the sum and substance of the respondents' case is that this Court should examine the evidence that AT&T introduced in the trial court and decide the arbitrability issue that the lower courts refused to address. Such a course would be a peculiarly inappropriate use of the Court's limited resources and time, especially because the application of the law to the facts of this case would appear to epitomize the questions that this Court does not sit to decide. See CWA Br. 26 (characterizing such a decision as a "thoroughly uneventful case").

The overriding factor, however, is that the issue whether AT&T's evidence rebuts the presumption of arbitrability was not considered by either the District Court or the Court of Appeals, was not presented in the Petition for Certiorari, and concededly (see CWA Br. 15) was not addressed in Petitioner's Brief. While the record on appeal contains all the evidence, many of the arguments pertaining to its sufficiency have not been briefed.[10] This

that a federal court has jurisdiction to decide subject matter jurisdiction. However, *Warrior & Gulf* makes it explicit that arbitrators cannot have the authority to make such determinations, unless the parties explicitly so provide in their contract. See *Warrior & Gulf*, 363 U.S. at 583 n. 7; Petitioner's Br. 15-16.

Similarly, there is no merit to CWA's suggestion (Br. 29) that *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), supports this reformulation of the standard. There, a matter had been submitted to arbitration voluntarily, and the Court did not even consider the role of a court in a suit to compel arbitration of a labor dispute because that was not in issue.

Finally, there is also no basis for CWA's claim (Br. 27) that there is "internal conflict" between two statements in *Warrior & Gulf*: (1) that arbitrability is for the courts to decide and (2) that arbitration should be ordered if the contract is susceptible to an interpretation that so requires. The first statement describes the forum in which the arbitrability decision must be made. The second statement simply expresses the evidentiary presumption in favor of arbitrability that courts are to apply in determining arbitrability.

[10]The Brief and Reply Brief that petitioner filed in the Seventh Circuit offer a summary of the evidence and state AT&T's basic theory, but

(Footnote continued on next page)

Court functions best when it has the benefit of the decisions by the lower courts and the focused presentations by the parties that are lacking here.

These considerations have acute significance because CWA and the Academy have done more than ask this Court to resolve the factual issue that AT&T raised below, but that was not decided. In arguing that this Court should evaluate AT&T's evidence and hold it to be insufficient, the Academy and CWA have each urged the Court to adopt a series of *per se* rules that would be significant departures from settled law and would exclude consideration of clear statements of the parties' intent, contrary to the *Steelworkers' Trilogy* and the decisions of a number of courts of appeals. These include claims that: (1) the presumption of arbitrability is virtually irrebuttable where, as here, there is an absolute no-strike clause;[11] (2) a *per se* rule should exist that "management functions clauses" are surplusage and do not exclude any disputes from arbitration, regardless of the specificity of the clauses and the other evidence of the intent of the parties;[12] (3) naturally do not respond to the many arguments that CWA and the Academy have raised for the first time in this Court.

[11]Academy Br. 8-10, 15; Contra, *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 382 (1974) (although "an arbitration agreement is usually linked with a concurrent no-strike obligation . . . the issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties."); *Ryder Truck Lines, Inc.* v. *Teamsters Freight Local Union No. 480*, 727 F.2d 594 (6th Cir.) (en banc), *cert. denied*, 105 S. Ct. 103 (1984) (parties may properly agree to prohibit strikes over non-arbitrable disputes); *United States Steel Corp.* v. *NLRB*, 711 F.2d 772 (7th Cir. 1983) (same); *Pacemaker Yacht Co.* v. *NLRB*, 663 F.2d 455 (3d Cir. 1981) (same).

[12]Academy Br. 10-15; *see* CWA Br. 9-23. Contra, *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (construing clause, but declining to give it effect because it was "vague" and there was no other evidence of an intent by the parties to exclude the dispute from arbitration); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 572-3 (1960) (Brennan, J., concurring); *Rochdale Village, Inc.* v. *Public Serv. Employees Union, Local No. 80*, 605 F.2d 1290, 1295 (2d Cir. 1979) (and cases cited); Elkouri and Elkouri, *How Arbitration Works*, pp. 457-63 (4th Ed. 1985) (noting sharp disagreements over meaning of these clauses).

Unions should be able to insist on arbitration of a grievance simply by asserting that a dispute exists under a contract provision;[13] and (4) courts may be justified in refusing to assess bargaining history and other parol evidence in the interest of avoiding "delays."[14] This Court should not consider such far-ranging changes in the law without the benefit of a decision by the lower courts and full briefing by the parties.

This case is here because the Seventh Circuit committed one clean error of law, albeit an important one. All that this Court need do, and all that it should do, is correct that error and remand the case so that the lower courts can perform the task that is properly theirs.

[13]CWA Br. 11-12; Contra, *Trailways of New England, Inc.* v. *Amalgamated Ass'n*, 353 F.2d 180, 182 (1st Cir. 1965); M. Grossman, *The Question of Arbitrability: Challenges to the Arbitrator's Jurisdiction and Authority*, 25 (1984) ("despite a party's allegation that a particular contract clause has been violated, the courts will, with appropriate proof, hold a matter nonarbitrable").

[14]Academy Br. 18, Contra, *Warrior & Gulf*, *supra*, 363 U.S. at 584-85; *see also* Petitioner's Br. 17-20. Indeed, to adopt this view would be peculiarly inappropriate because the Seventh Circuit itself has held that courts are required to consider bargaining history in those cases where the Seventh Circuit's exception does not apply. *E.g.*, *Associated Milk Dealers, Inc.* v. *Milk Drivers Union, Local 753*, 422 F.2d 546, 551 (7th Cir. 1970).

CONCLUSION

The judgment of the Seventh Circuit should be vacated and the case remanded for a judicial determination of arbitrability.

Respectfully submitted,

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January 15, 1986

*Counsel of Record

Appendix

AMERICAN ARBITRATION ASSOCIATION 140 WEST 51 STREET, NEW YORK, N.Y. 10020-1203

Phone: (212) 484-4000 • Telex: 12463

December 16, 1985

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55 East Monroe Street
Chicago, Ill 60603

Dear Mr. Hodnicki:

This is in response to your inquiry regarding the number of labor arbitration cases filed with the American Arbitration Association for the years 1982, 1983, 1984.

The number of labor arbitration cases filed are as follows:

1982 - 17,038

1983 - 17,511

1984 - 17,211

Approximately half of the cases filed are actually decided by an arbitrators award.

Very truly yours,

Frank T. Zotto

Frank T. Zotto
Associate Director
Case Administration

FTZ:pm

Offices: Atlanta • Boston • Cincinnati • Chicago • Columbia • Cleveland • Dallas • Denver • Detroit • Garden City, N.Y. • Hartford • Kansas City • Los Angeles • Miami • Minneapolis
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HEADQUARTERS 140 West 51st Street, New York, N.Y. 10020-1203

FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
WASHINGTON, D.C. 20427

December 17, 1985

Mr. Joseph A. Hodnicki
Research Librarian
Seyfarth, Shaw, Fairweather & Geraldson
1111 - 19th Street, N.W.
Washington, D.C. 20036

Dear Mr. Hodnicki:

This is in response to your letter of December 16, 1985, in which you request the following information:

Fiscal Year	No. of Arbitrator Appointments	No. of Award Cases Closed
1982	12,317	7,120
1983	13,729	6,096
1984	11,156	5,834

There is no charge for this information.

Sincerely,

Jewell L. Myers

Jewell L. Myers
Director for
Arbitration Services

AMICUS CURIAE

BRIEF

BEST AVAILABLE COPY

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 84-1913

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

AT&T TECHNOLOGIES, INC.,
Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA
AND ITS LOCAL 5090,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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November 21, 1985

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

With the consent of the parties, the National Association of Manufacturers (NAM) files this brief in support of the Petitioner. The NAM is a non-profit voluntary business association incorporated under the laws of the State of New York. The NAM represents approximately 13,000 companies, large and small, located in every state of the Union. Further, the NAM is affiliated with an additional 158,000 businesses through the Associations

Council and the National Industrial Council. The membership of the NAM represents an estimated 80 percent of all goods manufactured in the United States.

As the representative of America's manufacturing community, the NAM has had a long and deep interest in labor matters. Over the years, our members, many of whom are unionized, have participated in the public debate over the labor laws and have given these laws, once enacted, their support. The NAM Board of Directors has passed a number of policies on labor matters which guide our efforts in this area. In addition, the NAM has an educational subsidiary, CUE An Organization For Positive Employee Relations, which sponsors programs designed to foster good labor relations within the framework established by our national labor laws. While we often disagree with representatives of labor, the NAM supports the right of management and labor to freely bargain at arm's length, without government intervention, over the terms and conditions of employment.

We support the right of labor and management to bargain over all permissible subjects, including arbitration, although we oppose compulsory arbitration in any form. NAM policy, as passed by its Board of Directors, explicitly provides: "No form of compulsory arbitration, including labor courts, should be imposed or required by law."

The nature of our large national economy requires that, to the extent possible, the rules governing labor matters be national in scope, certain, and changed only in the face of compelling circumstances. As such, the decision of the court below is of concern to our membership. If left undisturbed, the ruling could have the effect of overturning well-settled precedent. This decision would inject uncertainty into an infinite number of labor contracts whose arbitration clauses were negotiated on the premise that a court, not an arbitrator, must determine the

threshold question of arbitrability of a particular dispute. The ramifications of this decision would extend far beyond the parties and would strike at the heart of national and local labor contracts too numerous to count. It is for these reasons that the NAM submits the following arguments to the Court in support of the Petitioner.

SUMMARY OF THE CASE

At all times pertinent to this case, the Petitioner and Respondents were parties to a national collective bargaining agreement which applied to telephone equipment installers in 26 locals. The Petitioner's decision to lay off 79 installers from its Chicago location led to a grievance being filed by the Respondents on September 17, 1981. The sole basis for this grievance was that, in the view of the Respondents, the collective bargaining agreement prohibited layoffs unless there was, in fact, a lack of work at a particular location; the contention was that there was no such lack of work in Chicago. There has been no claim of any anti-union animus on the part of the Petitioner in making the layoff decision. The Petitioner refused to submit the dispute to arbitration on the grounds that it was not arbitrable under the terms of the contract. The union then filed this suit to compel arbitration.

Both parties sought, in district court, to litigate the question of whether sufficiency of work-based layoffs had been excluded from arbitration under the contract. Neither party litigated the merits of the dispute. The district court, however, did not rule on the arbitrability of the grievance. Instead, it ordered the parties to submit this question to arbitration, claiming that the Respondents' interpretation of the contract was arguable. Consequently, the district court did not consider any of the evidence tending to show that the contract excluded disputes of this type from arbitration.

The Court of Appeals for the Seventh Circuit affirmed the district court's order. While it recognized the general

rule that arbitrability is an issue for a court of competent jurisdiction to decide, it noted the existence of an exception to this rule when a collective bargaining agreement contains a standard arbitration clause that does not clearly exclude the arbitrability issue from arbitration and where deciding the arbitrability issue would entangle the court in a consideration of the merits of the dispute. The details of this decision are set forth in the section of the Petitioner's brief entitled "Statement of the Case."

The writ of *certiorari* was issued to review this decision of the Court of Appeals for the Seventh Circuit.

SUMMARY OF THE ARGUMENT

Fostered by the Labor-Management Relations Act, 29 U.S.C. § 171, *et seq.* (LMRA), arbitration has become a popular means of resolving labor disputes that arise under a collective bargaining agreement. Because arbitration is a creature of contract, a party cannot be forced to submit an issue to arbitration unless it has agreed to so do. This Court, in a series of decisions, has set forth the principle that the judiciary must determine the applicability of an arbitration clause to a particular dispute. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). The policy underlying this doctrine will be seriously undermined unless the decision of the court below—which establishes a heretofore unrecognized "exception" to this rule—is reversed.

The utility and efficacy of arbitration provisions are threatened if a party could be forced to arbitrate an issue which the parties had intended to exclude from this process. The implications of the decision below are profound and serious for they call into question the assumptions under which all arbitration provisions have been negotiated and implemented for a generation. Labor peace, a goal of the framework established by our labor laws, is threatened by a decision which could force a reluctant party into arbitration without a prior judicial determination that the contract requires arbitration. Because the rationale of the court below is incapable of consistent application, it could lead to fundamental decisions on arbitrability under national agreements being decided under different standards depending on where the dispute arose. The incentive for forum shopping which this would create is not conducive to good relations between labor and management or judicial economy. A decision which could lead to confusion, uncertainty and increased labor strife—as well as diminished reliance on peaceful arbitration—should not be sanctioned by this Court. As such, the decision below should be reversed and remanded.

ARGUMENT

I. THE DECISION BELOW IGNORES THE TRADITIONAL AND WELL-SETTLED ROLE OF THE JUDICIARY IN LABOR DISPUTES

Collective bargaining is a time-consuming and often difficult process. Experienced negotiators, representing labor and management, must come together and eventually agree on the terms of employment that will govern a large number of employees for a number of years. It is inevitable that even the best and most carefully crafted agreements will leave questions unanswered or will simply be unable to cope with every situation that may arise while the contract is in force.

Arbitration has become a popular mechanism for dealing with these situations. Arbitration is, however, a matter of contract, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and cannot be imposed by judicial fiat. *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 221-22 (1979). When questions of arbitrability arise, the parties to collective bargaining agreements thus look to the courts, under the mandate of LMRA Section 301 (29 U.S.C. § 185(a)), to give effect to their intent as to whether a particular dispute is subject to arbitration. Judicial enforcement of

this intent is mandated by Section 203(d) of the LMRA which provides that in disputes arising under a labor agreement, "the method agreed upon by the parties is declared to be the desirable method for application or interpretation" of the agreement. 29 U.S.C. § 173(d). Thus, while the government has a certain vested interest in the existence of labor peace, it is not a party to the negotiations, and, as such, may not ignore the intent of the parties and impose its views of a desirable settlement on them. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-04 (1970).

Recognizing this, this Court, in a series of cases known collectively as the *Steelworkers Trilogy*, *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), set forth principles concerning the labor arbitration process that have guided both the negotiation and administration of labor arbitration proceedings for a generation. Foremost among these is the rule that a federal court may not compel arbitration of any labor grievance unless the court, and not an arbitrator, first determines that the parties agreed to arbitrate the particular dispute in question and had agreed to give the arbitrator the power to decide the controversy. *Warrior & Gulf*, 363 U.S. at 582-83 (1960).

The *Steelworkers Trilogy* rests on the congressional mandate of the LMRA which gave the courts the duty of determining if a reluctant party had breached its duty to arbitrate. *Id.* at 582. Arbitration, as a creature of contract, cannot be forced on a party that has not contractually obligated itself to arbitrate. In a later affirmation of the *Steelworkers Trilogy*, this Court noted that:

> The duty to arbitrate being of a contractual origin, a compulsory submission to arbitration cannot preclude judicial determination that the collective bargaining agreement does in fact create such a duty.

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546 (1964).

The decision of the Seventh Circuit ignores this rule and substitutes a presumption of contract meaning which ignores the intent of the collective bargaining agreement. Instead, the court impermissibly substituted its own view of a desirable settlement, i.e., that if there are differences of opinion as to the arbitrability of a dispute, a court may delegate that decision to an arbitrator—a result not in concert with prior decisions of this Court or the thrust of our national labor policy.

Compulsory arbitration, which is essentially the result of the decision of the Seventh Circuit, is not favored under the framework established by our labor laws as it ignores the contractual origin of the arbitration provisions contained within collective bargaining agreements. Further, ignoring the bargaining history of the parties and evidence of their intent in the negotiating process pays no heed to the decisions of this Court and those of the other circuit courts of appeals. *See e.g., Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Communications Workers of America v. Pacific Northwest Bell Tel. Co.*, 337 F.2d 455 (9th Cir. 1964); *California Trucking Ass'n v. Teamsters, Local 70*, 679 F.2d 1275 (9th Cir. 1981), *cert. denied*, 459 U.S. 970 (1982).

Here, a court of competent jurisdiction has abdicated its responsibility to the parties under 29 U.S.C. § 185(a) (Section 301 of the LMRA) and has assigned its judicial power to determine arbitrability to an arbitrator, contrary to the intent of the parties and despite the fact that there was ample evidence that showed that the arbitrator was never meant to enjoy this prerogative. We suggest that this course ignores national labor policy

considerations as well as prior decisions of this Court and, as such, should be reversed.

II. THE DECISION OF THE COURT BELOW WILL LEAD TO CONFUSION AND UNCERTAINTY IN BOTH LABOR NEGOTIATIONS AND THE ADMINISTRATION OF LABOR AGREEMENTS

In recognition of the size and diversity of our national economy, Section 301(a) of the LMRA, 29 U.S.C. § 185 (a), explicitly provides that the courts are to enforce labor contracts. Under this mandate, this Court, and the courts of appeals, have developed a body of law, that, in concert with the relevant statutes, have become a nationally applicable system and framework for labor relations. In this manner, both labor and management have had their activities guided by a relatively uniform set of standards and an expectation of predictability; that is, both labor and management knew that a national labor contract would be interpreted and enforced similarly throughout the country.

Until now, judicial interpretation and enforcement of arbitration provisions under Section 301(a) has followed this pattern. This Court has held that the judiciary has "the duty of determining whether the reluctant party has breached his promise to arbitrate [and that] arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U.S. at 582-83 (1960). Other decisions of this Court have noted that the judiciary must decide if a company is bound to arbitrate and what issues it is required to arbitrate under a contract. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

Other courts of appeals have rejected the Seventh Circuit's unique view of the subject matter of this case and have been virtually unanimous in holding that the threshold question of arbitrability must be decided by a court

as a matter of law. *See Painters, Local 558 v. Lord & Burnham Constr. Corp.*, 705 F.2d 998, 1000 (8th Cir. 1983), *California Truckingg Ass'n v. Teamsters, Local 70*, 679 F.2d 1275, 1281, n.5 (9th Cir. 1981), *cert. denied*, 459 U.S. 970 (1982). These courts have agreed to consider the very kind of evidence that the Seventh Circuit refused to hear and interpret. Clearly, the question of the role of the court in determining arbitrability would have been decided differently in virtually any other circuit. Petitioner's Brief for Certiorari at 13-14.

The potential for confusion and uncertainty as a result of the decision of the court below should be clear. The arbitration process, a feature of countless collective bargaining agreements and a keystone of industrial peace, will be undermined by this decision. The reasons for the popularity of arbitration are varied, but they include its utility as a means for avoiding costly strikes over many kinds of disputes, as well as the knowledge that the judicial system will enforce the obligation to arbitrate. As a creature of contract, the parties know that arbitration will be limited and apply only to specific situations that have been bargained for. The parties know that these carefully crafted compromises will be enforced and not undone by a court. They know that they will not be forced to arbitrate a matter that they have not agreed to arbitrate. The line of decisions cited earlier has traditionally buttressed these beliefs.

If left undisturbed, the Seventh Circuit's opinion will upset this orderly framework. The attractiveness of arbitration would diminish because subjects could be considered arbitrable regardless of the intent of the parties. Labor tranquility, fostered by the presence of arbitration provisions in many collective bargaining agreements, would be threatened. The prospect of compulsory arbitration, a concept alien to our labor law framework, could cause many employers to reconsider their commitment to this method of dispute resolution.

Of equal concern to the NAM and its members are the profound and immediate implications this decision has for the administration of existing national collective bargaining agreements and the negotiation of new ones. The NAM and its members favor the rapid and peaceful resolution of labor disputes within the framework established by our labor laws and support voluntarily negotiated arbitration as a means to this end. However, the ruling of the Seventh Circuit could apply to numerous extant agreements. The exception created below could swallow the rule that courts must decide the arbitrability question and, as such, apply to any collective bargaining agreement that contains a "standard" arbitration clause. As such, a basic premise on which the administration of existing agreements rest and new agreements are negotiated would be destroyed. Threshold questions of arbitrability under many national labor agreements could be governed by different standards depending on where the dispute arose. The result—forum shopping and additional litigation—is diametrically opposed to the fundamental thrust of our national labor policy. This decision, if allowed to stand, could also needlessly complicate, or even prevent, the negotiation of arbitration provisions in new collective bargaining agreements. The upshot could be a wave of collective bargaining agreements without any arbitration provisions resulting in wildcat strikes or other serious labor disturbances over relatively minor disputes.

The NAM does not believe that such a result is in the best interest of our members or the nation. Yet, labor peace could be threatened if labor and management are required to reexamine their contracts to insure that an arbitrator has not been inadvertently granted the authority to decide the threshold question of arbitrability. We suggest that any diminution of the willingness of labor and management to arbitrate is not in the national interest and is contrary to the overall intent and thrust

of our labor laws. As such, we urge this Court to reverse the decision of the court below.

CONCLUSION

This Court should take this opportunity to reaffirm precedent which holds that the federal courts are obliged to make threshold determinations of arbitrability. Countless collective bargaining agreements have been negotiated with this well-settled principle in mind. The decision of the court below ignores this precedent and threatens to upset this stable area of law. Moreover, the ruling of the Seventh Circuit promises to end the era of uniform enforcement of collective bargaining agreements begun by this Court some 25 years ago.

We therefore respectfully request that this Court reverse the decision below, with directions that the case be remanded to the district court to address the issues and evidence on arbitrability it previously refused to consider.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 84-1913

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

AT&T TECHNOLOGIES, INC.,
Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA
AND ITS LOCAL 5090,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the fundamental principle of labor law that a party cannot be ordered to arbitrate a labor dispute *unless* a court first determines that the collective bargaining agreement mandates arbitration of the dispute (*see John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 546-47 (1964); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)) can be subject to a broad "exception" in which the threshold question of arbitrability must be delegated to an arbitrator whenever it can be characterized as "involving" the merits of the dispute.

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST AND CONCERN OF THE AMICUS

On behalf of the businesses it represents, the Chamber of Commerce of the United States ("Chamber") urges the Court to reverse the decision of the Seventh Circuit Court of Appeals creating an unjustified, shortsighted and impractical "exception" to the "firmly entrenched" rule that a court must decide in the first instance whether two parties have contractually agreed to arbitrate a particular

labor dispute before ordering the parties to arbitration.[1] The Chamber is the largest business and professional organization in the United States. Its membership consists of over 180,000 corporations, partnerships and proprietorships as well as several thousand trade and professional organizations and state and local chambers of commerce.

Numerous business entities represented by the Chamber have entered into national or regional labor contracts in reliance upon uniform nationwide enforcement of such contracts. Consistent with federal labor policy that encourages informal, private resolution of labor disputes, the majority of those labor contracts contain provisions for arbitration of a wide range of issues.

Also consistent with federal labor policy, however, the parties agreeing to such arbitration provisions have done so on the express understanding that only those disputes that they contractually agree to arbitrate are subject to arbitration. This Court has reaffirmed on numerous occasions the rule that no court can order a party to arbitrate a particular dispute absent a contractual obligation to do so. Thus, in all cases in which one party to a labor agreement seeks to compel the other party to arbitrate, it is for a court to determine in the first instance whether the parties contractually agreed to such arbitration.

The Seventh Circuit's "exception" swallows that general rule. In so doing it creates confusion in the lower courts [2]

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[1] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Court Clerk.

[2] Numerous recent decisions in the lower courts have continued to adhere faithfully to this Court's standards. *See, e.g., United Steelworkers v. Phelps Dodge Corp.*, 764 F.2d 576, 578 (9th Cir. 1985) ("The firmly entrenched general rule is that: 'arbitrability is a matter for the courts to determine.'"); *Salinas Cooling Co. v. Fresh Fruit & Vegetable Workers, Local P-78A*, 743 F.2d 705, 707-08 (9th Cir. 1984). ("The question whether a dispute is subject to arbitration is for the court to decide"; although "there is a strong policy favoring arbitration of labor disputes," that policy "does not relieve the district court of its duty to make the arbitrability determination."); *George Day Construction Co. v. United Brotherhood of Carpenters, Local 354*, 722 F.2d 1471, 1474 (9th Cir. 1984) ("It is equally settled that, in the usual case, the court is charged with the duty of deciding the issue of arbitrability."); *Brotherhood of Painters and Allied Trades, Local 558 v. Lord & Burnham Construction Corp.*, 705 F.2d 998, 999-1001 (8th Cir. 1983) ("It is well settled that although courts must refrain from addressing the merits of labor disputes subject to arbitration, the arbitrability of a particular dispute is for the courts to decide."); *Mobil Oil Corp. v. OCAW, Local 8-766*, 600 F.2d 322, 324-25 (1st Cir. 1979) ("The only logical interpretation that can be given to the italicized sentence is that the district court misunderstood its duty to decide independently the question of arbitrability and erroneously deferred to the arbitrator's determination that the subcontracting dispute was arbitrable."). The vast majority of lower court holdings have followed similar lines.

The Fourth, Fifth and Sixth Circuits, however, have previously issued holdings that, like that of the Seventh Circuit, appear to depart from this Court's standards. *See A.S. Abell Co. v. Baltimore Typographical Union No. 12*, 338 F.2d 190, 195 (4th Cir. 1964) (leaving arbitrability determination to arbitrator where meaning of arbitrability clause was "not clear beyond rational debate"); *OCAW, Local 4-23 v. American Petrofina Co.*, 759 F.2d 512, 515-16 (5th Cir. 1985); *International Union v. E-Systems, Inc.*, 632 F.2d 487, 489 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *Salary Policy Employee Panel v. Tennessee Valley Authority*, 731 F.2d 325, 331-32 (6th Cir. 1984) ("[W]e conclude that the party asserting that questions of arbitrability should be decided by the arbitrator satisfies his burden by demonstrating that it cannot be said positively that the parties intended to have a court decide questions of arbitrability."). It was not clear in these cases, however, that the courts recognized, as did the Seventh Circuit, that their holdings were clear "exceptions" to the general rules enunciated by this Court.

and thereby frustrates the uniform enforcement of federal labor policy, upon which the success of national and regional labor agreements depends. The primary interest of the Chamber, many of whose members operate on a national or multi-state basis, is in uniform and orderly application of the labor laws, and for that reason the Chamber urges the Court to reaffirm once again the solid

principles upon which 25 years of labor negotiations have relied.

SUMMARY OF THE ARGUMENT

This case presents no new issues, nor does it present an instance in which the Court would be advised to revisit an old issue in the light of new circumstances. Rather, this is an instance in which the Court is called upon simply to reaffirm its prior holdings to prevent erosion of heretofore unquestioned fundamental principles through misapplication in the lower courts.[3]

The Chamber fully supports the arguments put forth by petitioner AT&T Technologies in this Court, and endorses those arguments without repeating them here. The Chamber's effort here is to present the reasons for overturning the Seventh Circuit's decision in a somewhat different light. Congress long ago determined that the best means for insuring orderly labor relations was to regulate the procedures for negotiating labor agreements, but to leave to the parties the freedom to reach the substantive terms of such agreements. Many well-established principles of labor law are concerned with how best to effectuate the parties' contractual intent without otherwise intruding on the parties' freedom of contract. That is particularly so of the procedures this Court has developed to guide the lower courts in effectuating the parties' intent with respect to arbitration of particular disputes.

This Court has long held that because arbitration of labor disputes is purely a creature of contract, no party can be compelled by a court to arbitrate a particular dispute unless the court first determines that the dispute is arbitrable under the parties' contract. The Seventh Circuit has established an "exception" to this ironclad rule. In so doing, the Seventh Circuit has infringed upon the parties' contractual intent by ordering them to arbitrate an issue—arbitrability—they clearly never have agreed to arbitrate. Moreover, the Seventh Circuit's approach is short-sighted because it fails to account for situations in which a court faced with the potential irreparable harm of a strike lacks the luxury of deferring to an arbitrator's determination of arbitrability in the first instance. Additionally, the Seventh Circuit's holding is impractical because it prolongs and encumbers the grievance process with another layer of procedure; the need for court review of the arbitrability issue is merely delayed, not eliminated.

[3] This case is thus similar to *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in which this Court was required simply to reiterate the proper standards of proof applicable in a Title VII case alleging discriminatory treatment. The Fifth Circuit had seen fit to modify the applicable standards of proof and this Court held that the Fifth Circuit erred in not applying the standard of proof previously established by this Court. 450 U.S. at 252-53, 256-60.

ARGUMENT

I. The Seventh Circuit's "Exception" Overrides Fundamental Federal Policy Favoring Freedom Of Contract As The Best Means Of Governing Labor Relations In An Orderly Fashion

Perhaps the most fundamental precept of federal labor policy is freedom of contract. "[T]he fundamental premise on which the [National Labor Relations] Act is based" is "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). Thus, although the parties to a labor negotiation are bound by a duty to bargain in good faith, it is settled federal labor policy that a court has no authority to write the substantive terms of a labor agreement for the parties. *Id.*

Based on the fundamental notion of freedom of contract, this Court has long held in no uncertain terms that the obligation to arbitrate a particular labor dispute is purely a matter of contract. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964); *Gateway Coal*

Co. v. United Mine Workers, 414 U.S. 368, 374 (1974); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Accordingly, this Court has held in equally certain terms that a court is powerless to compel a party to arbitrate absent such a contractual obligation, and therefore that a court must decide in the first instance whether such a contractual obligation exists. *See id.*; *see also Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), *overruled in part on other grounds, Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

Neither the district court below nor the Seventh Circuit has yet found that petitioner AT&T Technologies had contractually agreed to arbitrate the particular issue raised by the respondent Union. Nor did they find that the parties agreed to arbitrate disputes over arbitrability.[4] Nevertheless, the lower courts ordered petitioner

[4] By contrast, many collective bargaining agreements do provide explicitly that *all* disputes, including the issue of arbitrability, are to be resolved by the arbitrator. *See, e.g., Alpha Beta Co. v. Retail Store Employees Union, Local 428*, 671 F.2d 1247, 1250 (9th Cir. 1982) (arbitration clause provided that disputes "involving or arising out of the meaning, interpretation, application or alleged violation of this Agreement, *including the arbitrability of all such matters*" would be submitted to arbitration) (emphasis supplied); *Amalgamated Clothing & Textile Workers Union v. Ratner Corp.*, 602 F.2d 1363, 1366 (9th Cir. 1979). When there is a "clear demonstration" of the parties' intent to refer issues of arbitrability to the arbitrator, the courts are bound, on the same principles of freedom of contract discussed above, to give content to the parties' intent and order such arbitration. *Alpha Beta*, 671 F.2d at 1250; *see also Amalgamated Clothing Workers*, 602 F.2d at 1371; *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 571 (1960) (Brennan, J., concurring). Such an intent will never be presumed, however, and the burden is on the party seeking to compel such arbitration to prove that the parties had contractually agreed to such a procedure. *See Warrior & Gulf*, 363 U.S. at 583 n.7; *American Mfg. Co.*, 363 U.S. at 571 (Brennan, J., concurring); *but see Salary Policy Employee Panel v. Tennessee Valley Authority*, 731 F.2d 325, 331-32 (6th Cir. 1984) (rejecting Supreme Court precedent in favor of

to arbitrate the issue of arbitrability. In so doing, the lower courts have imposed a substantive contractual term upon AT&T Technologies and the Union to which they clearly never have agreed. The Seventh Circuit's holding thus puts courts into the heretofore prohibited business of rewriting collective bargaining agreements. *See H.K. Porter*, 397 U.S. at 108; *see also Irwin v. Carpenters Health & Welfare Trust Fund*, 745 F.2d 553, 557 (9th Cir. 1984) ("Judicial rewriting of labor contract terms . . . would undermine this private bargaining process which federal labor policy promotes").

The Seventh Circuit's rationale for such an extraordinary intrusion into the bargaining process apparently was based on its reading of another fundamental principle of labor law: A court "should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause." *Warrior & Gulf*, 363 U.S. at 585; *see also American Mfg. Co.*, 363 U.S. at 568 ("the courts . . . have no business weighing the merits of the grievance"). The Seventh Circuit evidently believed that resolution of the arbitrability issue in this case "involved" the merits, and on that basis adopted its "exception."[5] Although the principle that courts are not to resolve substantive questions in the guise of determining arbitrability is unquestioned, the Seventh Circuit fundamentally misconstrued the underlying purpose of the rule.

The rule prohibiting a court from reaching the merits of an arbitrable dispute is based, like the other prin-

presumption that parties intended for arbitrator to determine arbitrability—*see supra* note 2, at p. 3).

[5] Petitioner, argues that the determination of arbitrability did not "involve" the merits at all. The Chamber agrees with petitioner on this point.

ciples discussed herein, on freedom of contract. *See American Mfg. Co.*, 363 U.S. at 568 ("the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for"). The obvious purpose of the rule is to effectuate the parties' contractual intent to allow the arbitrator, rather than a court, to decide the merits of the dispute. *Cf. id.* at 572 (Brennan, J., concurring) ("[T]he very ambiguity of the *Warrior* exclusion clause suggests that the parties were generally more concerned with having an arbitrator render decisions as to the meaning of the contract than they were in restricting the arbitrator's jurisdiction.").[6] Thus, if the parties have contractually agreed to arbitrate a particular dispute, a court should not interfere with that agreement by usurping the role assigned to the arbitrator. The Seventh Circuit erred, however, by elevating this rule above other equally important rules designed to give effect to the parties' intent.

The Seventh Circuit's error is demonstrated by the effect of its approach. By leaving the issue of arbitrability to the arbitrator, the Seventh Circuit reached the one result clearly *not* contemplated by the parties' agreement: delegating arbitrability to the arbitrator. Thus, the Seventh Circuit has managed only to frustrate the parties' intent. This Court has long recognized that a

[6] The rule also gives effect to the congressional declaration set forth in section 203(d) of the Labor-Management Relations Act:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

29 U.S.C. § 173(d) (1982). Congress's declaration is, of course, grounded in freedom of contract, as evidenced by the language "by a method agreed upon by the parties." *Id.* Congress merely declared that such contractually agreed upon dispute resolution was "desirable"; it did not mandate that all labor agreements must contain arbitration provisions for all disputes.

certain tension exists between the duty of the courts to determine arbitrability in the first instance, and their duty to refrain from deciding substantive issues on the merits. *See American Mfg. Co.*, 363 U.S. at 570-73 (Brennan, J., concurring). The resolution of this tension is not advanced, however, by punting the issue to the arbitrator. Rather, the courts must deal with the issue in an attempt to effectuate the parties' intent. *See Brotherhood of Painters and Allied Trades, Local 558 v. Lord & Burnham Construction Corp.*, 705 F.2d 998, 1000-01 (8th Cir. 1983).

Recognizing the problem of limiting the courts' role in determining arbitrability, this Court held 25 years ago, in the *Steelworkers* trilogy,[7] that a "presumption of arbitrability" exists when a labor contract contains a broad arbitration clause with vague or ambiguous exclusions. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 377 (1974). At the same time, this Court declared that the presumption could be overcome by "forceful evidence of a purpose to exclude the claim from arbitration." *Warrior & Gulf*, 363 U.S. at 585. By using these procedural tools, a court normally can resolve an arbitrability issue without incursion into the merits of the underlying dispute.

Surprisingly, the Seventh Circuit shed this Court's teachings in favor of its new approach without even first *attempting* to resolve the case by applying the presumption and measuring it against the forceful evidence introduced by petitioner. Rather, the lower courts ignored both the presumption and petitioner's attempt to overcome it in their rush to embrace a new exception.[8]

[7] *American Mfg. Co.*, 363 U.S. 564; *Warrior & Gulf*, 363 U.S. 574; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[8] The lower courts refused to consider evidence of the parties' bargaining history introduced by AT&T Technologies to show the parties' understanding that the particular dispute underlying this case was not arbitrable. *See infra* discussion in section III.

This Court should reverse and remand with instructions to the lower courts to determine the arbitrability question applying the standards set by this Court 25 years ago and still good today.

II. The Seventh Circuit's Exception Is Short-Sighted And Impractical

Not only does the Seventh Circuit's "exception" frustrate the parties' contractual intent, it also is impractical in certain situations. For example, the exception is unworkable in a *Boys Markets*[9] context, in which a court is required to make the same determination of arbitrability as it should have here. In a *Boys Markets* case the court is called upon to determine the arbitrability of a particular dispute in the midst of an ongoing or imminent strike, likely to result in irreparable harm if not enjoined. The court is allowed to enter an injunction *only* if the dispute *underlying* the strike is arbitrable. *See Jacksonville Bulk Terminals v. International Longshoremen's Association*, 457 U.S. 702, 721 (1982); *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407-08 (1967). In such a situation the court lacks the luxury or authority to enter an injunction while it defers to the arbitrator to determine arbitrability, since arbitrability will rarely, if ever, be the underlying dispute.

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[9] *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). In *Boys Markets* this Court held that an important exception to the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1982), exists when a union strikes in contravention of an anti-strike provision over an issue the parties have contractually committed to arbitration . This Court held that because an arbitration provision usually is the *quid pro quo* for a no-strike provision, it would uphold the parties' intent by permitting an injunction against a strike pending the outcome of the agreed upon arbitration. 398 U.S. at 248. The primary issue in a *Boys Markets* case becomes whether the issue underlying the strike is arbitrable under the labor contract. *Id.* at 254; *see Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407-08 (1976).

The Seventh Circuit's approach clearly will fail in a *Boys Markets* situation. Yet, the only difference between the court's role in determining arbitrability here and in a *Boys Markets* case is the exigency of the situation. Thus, the Seventh Circuit will be forced to apply an inconsistent standard whereby courts decide arbitrability in the first instance in cases requiring quick judgment, but courts will defer to the arbitrator in the first instance when time would otherwise allow the court to make a more reasoned judgment. There is no rationale for such a result. If the courts must decide arbitrability in some instances, consistent application of the labor laws demands that they decide arbitrability in all instances, absent a compelling reason to the contrary. The Seventh Circuit identified no such compelling reasons.

The Seventh Circuit's approach also is shortsighted in that it prolongs, rather than streamlines, the grievance process. The Seventh Circuit has not eliminated the necessity for a court to determine whether a particular issue is arbitrable. It has only delayed that determination, because a party is entitled to at least a limited review[10] of the arbitrator's decision. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *Local 369, Utility Workers Union v. Boston Edison Co.*, 752 F.2d 1, 2-5 (1st Cir. 1984); *United Steelworkers v. Timken Co.*, 717 F.2d 1008, 1014-15 (6th Cir. 1983).[11]

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[10] *See infra* note 12 for discussion of the standard of review of an arbitrator's decision.

[11] In each of the cited cases the parties initially agreed to submit their dispute to arbitration in the first instance, and then one party sought review after an unfavorable arbitrator's decision. The present case is quite different because petitioner contends it never agreed to arbitrate either arbitrability *or* the underlying dispute. Respondent argues that petitioner did agree to arbitrate the underlying dispute, and therefore breached its contract by refusing to arbitrate. It is that alleged breach of contract that initially gave the district court jurisdiction over this action pursuant to section

Thus, in a typical case applying the Seventh Circuit's exception, the party seeking to compel arbitration will still be required to go to court first. If the court finds that the parties agreed to a "standard" arbitration clause, that there is at least some credible argument for and against arbitration, and that resolution of arbitrability "involves" the merits of the underlying dispute, then the court will order arbitration of arbitrability. After the arbitrator rules, the losing party can seek review of the arbitrator's decision in the district court.[12] *See, e.g., Local 369, Utility Workers Union v. Boston Edison Co.*, 752 F.2d 1 (1st Cir. 1984). Thus, the Seventh Circuit has accomplished little more than judicial procrastination. In return, the Court infringes upon the

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301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982). Section 301, of course, makes it the court's job, and not an arbitrator's, to determine whether such a breach has in fact occurred.

[12] The Seventh Circuit's holding opens a host of new issues that surely will have to be litigated in the future. One is whether the party resisting arbitration may seek review of an arbitrator's decision in favor of arbitrability immediately, or whether it must wait until the underlying dispute has also been arbitrated. Another is the standard of review to be used. Although the usual standard of review of an arbitrator's decision is whether it "draws its essence" from the collective bargaining agreement, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), a strong argument could be made that less deference is due to an arbitrator's decision on arbitrability when a court has yet to examine the issue. *Cf. United Steelworkers v. Timken*, 717 F.2d at 1014-15 (although arbitrator characterized decision as one of "arbitrability," decision was actually on merits of controversy, and therefore entitled to deference); *Mobil Oil Corp. v. OCAW, Local 8-766*, 600 F.2d 322, 325 (1st Cir. 1979) (in reviewing arbitration award where parties disagreed over arbitrability, but did not submit issue to arbitrator, court must make its own independent determination of threshold issue of arbitrability); *see also supra* note 11. These issues are not ripe for decision at the moment, but they should be recognized as part of the thicket ahead should this Court uphold the Seventh Circuit's approach.

parties' contractual rights, prolongs their disputes, and multiplies their costs.

III. The Seventh Circuit Erred In Ignoring Evidence Of Bargaining History

The Chamber agrees very strongly with petitioner that the Seventh Circuit's opinion must be reversed to the extent it ignored evidence of bargaining history or any other "forceful evidence" of an intent to exclude a particular controversy from arbitration. It is particularly appropriate for the courts to consider evidence of bargaining history in the determination of arbitrability. *See, e.g., California Trucking Association v. Brotherhood of Teamsters, Local 70*, 679 F.2d 1275, 1281 n.5 (9th Cir. 1981), *cert. denied*, 459 U.S. 970 (1982); *International Brotherhood of Electrical Workers, Local 2188 v. Western Electric Co.*, 661 F.2d 514, 516 & n.4 (5th Cir. 1981); *Communications Workers v. Pacific Northwest Bell Telephone Co.*, 337 F.2d 455, 459 (9th Cir. 1964).

If the party resisting arbitration is prohibited from presenting parol evidence on the issue of arbitrability, the "presumption of arbitrability" becomes an irrebuttable presumption. Labor contracts are often vague and ambiguous, and their meaning is often illuminated as much by what was proposed and not adopted, as by what was adopted. *See Communications Workers*, 337 F.2d at 458-60; *cf. American Mfg. Co.*, 363 U.S. at 570 (Brennan, J., concurring) ("Words in a collective bargaining agreement . . . are to be understood only by reference to the background which gave rise to their inclusion."). To hold that such evidence is inadmissible would hinder the courts in their efforts to effectuate the parties' contractual intent.

CONCLUSION

The Seventh Circuit's holding in this case trenches upon the fundamental right to freedom of contract between the parties to a labor agreement. In so doing, the Seventh Circuit has done nothing to advance federal policy in the field of labor relations. Rather, the lower court's exception proves shortsighted and impractical in application, frustrating the parties' intent and clogging the grievance machinery with more, rather than less, court interference.

For the reasons stated herein, this Court should reverse the decision below with directions to remand the case to the district court to address the issues in light of this Court's precedents and to consider the evidence on arbitrability it previously ignored.

Respectfully submitted,

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Dated: November 21, 1985

AMICUS CURIAE

BRIEF

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No. 84-1913

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

Supreme Court, U.S.
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Petitioner,

VS.

COMMUNICATIONS WORKERS OF AMERICA
AND ITS LOCAL 5090,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ACADEMY OF ARBITRATORS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE NATIONAL ACADEMY OF ARBITRATORS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST AND CONCERN OF THE AMICUS

The National Academy of Arbitrators was founded in September 1947. Its membership is limited to those who have substantial and current experience as impartial arbitrators of labor-management disputes so as to reflect general acceptability by the parties, or those with limited but current experience in arbitration who have attained general recognition through scholarly publication or other activities as impartial authorities on labor-management relationships. Its principle purposes are "to establish and foster high standards and competence among those engaged in the arbitration of labor-management disputes on a professional basis; to adopt canons of ethics to govern the conduct of arbitrators; to

promote the study and understanding of the arbitration of labor-management disputes." It is co-author, with the American Arbitration Association and the Federal Mediation and Conciliation Service, of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. As of September 1985 the membership of the Academy totalled approximately 637. The annual meetings of the Academy are the occasion for the presentation of papers by scholars, arbitrators and representatives of labor and management dealing with the nature of the arbitration process, its relationship to the law and the conduct of labor-management relationships in general. The proceedings of the annual meetings are published by the Bureau of National Affairs and constitute the most authoritative collection in existence of materials on the arbitration process.[1]

Early in its history the Academy established a committee on law and legislation. Although the Academy resolved that it should take no official position on the question of whether there should or should not be statutory regulation with respect to labor arbitration it also resolved that it could, consistently with that principle of self-abnegation, indicate its judgment as to the desirable content of regulatory statutes.[2] This concern of the Academy with the effect upon the labor arbitration process of proposed legislation became moot with the decision of this Court in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957) establishing that the

[1] Thus, for example, the article by Archibald Cox relied upon repeatedly by petitioner in this case (Pet.Br., 8, 12, 16, 17) first appeared as a paper delivered at an annual meeting of the Academy. Cox, *Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case,* in ARBITRATION AND THE LAW, NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 12TH ANNUAL MEETING 24 (1959). The statement by petitioner, at page 24 of its brief, that "the *Steelworkers Trilogy's* holding that federal courts will interpret and enforce arbitration obligations has been a major reason why arbitration has been so widely accepted as a means of dispute resolution" is based on a paper submitted to the thirty-third annual meeting of the Academy.

[2] See Dash, *The Academy and Public Opinion,* in CHALLENGES TO ARBITRATION, PROCEEDINGS OF THE 13TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 6 (1960).

law governing collective bargaining agreements and arbitration was to be federal derived from the National Labor Relations Act. Although some doubt was initially expressed in the Academy as to the desirability of the *Lincoln Mills* decision,[3] the subsequent decisions by this Court, principally in the Steelworkers Trilogy, have led to the conclusion, quoted by petitioner, that this Court's decisions are a cause for celebration by all parties concerned with the arbitration of labor-management disputes.

This is the first *amicus curiae* brief filed in this Court by the Academy. It is filed, with the consent of the parties, because the Academy believes that if the law is to be involved in the arbitration process, as Congress in effect mandated by enacting Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185), that involvement should serve to effectuate the purposes for which unions and employers have established that process. The course of this Court's decisions with respect to arbitration have, we believe, served that purpose. Because this case has the potential for disturbing the regime established by the prior decisions of the Court, the Academy has taken the unusual step, for it, of filing this brief. The importance of the case is not the result for the particular parties involved. The importance, rather, is in the doctrine announced in the case as it affects the relationship between the courts and the arbitration process in the countless other cases which may follow in the future. It is our hope that this brief will assist the Court in understanding the context in which cases such as the present one arise and in announcing doctrine which will support rather than undermine a process that both unions and employers have found to be desirable.

In this brief we will deal, as we must, with the agreement in this case. The principal contribution we hope to make, however, is to assist the Court in dealing with the concept of arbitrability in general and in developing the proper approach in determining the

[3] See Aaron, *On First Looking Into the Lincoln Mills Decision,* in ARBITRATION AND THE LAW, PROCEEDINGS OF THE 12TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1 (1959).

scope of such exceptions to arbitrability as unions and management may negotiate.

SUMMARY OF ARGUMENT

It is the position of the Academy that the question presented in this case as stated by the petitioner must be answered, as petitioner argues, in the negative but that the District Court's judgment for respondent should, nevertheless, be affirmed.

The petitioner is correct in urging that arbitration should not be ordered unless the court finds that the dispute sought to be arbitrated comes within the arbitration agreement and is not specifically exempted from it. Conversely, if the dispute does come within the arbitration agreement a court should order arbitration without regard to its view of the merits of the union's claim. The fact that arbitration is the substitute for the strike requires that if the union's no-strike commitment is absolute, as it is here, all doubts be resolved in favor of arbitration. But where there is a specific exclusion from arbitration, a court asked to order arbitration must determine whether the union's claim falls within that exception.

The summary judgment of the District Court ordering arbitration of the union's grievance must nevertheless be affirmed. The claimed exemption from the general arbitration provision of this agreement upon which petitioner relies is the "management functions" clause, Article 9. Management functions provisions in general, and in this case, are subject to the other provisions of the agreement. They are the reciprocal counterpart of the provisions of the agreement limiting the way management performs its functions and cannot serve as an exemption from arbitration of claims that management has violated one of those limiting provisions.

In this case neither the management functions nor the arbitration provisions of the agreement specifically excludes from arbitration the claim made by the union that management's decision to lay off employees violated the section of the agreement governing layoffs, Article 20. Those provisions do make reference to matters elsewhere excluded from arbitration and there is at least

one such specific exclusion: the grievances of disciplined employees with less than six months of service. But that exclusion is expressly not applicable to layoffs. The petitioner, furthermore, has expressly agreed that grievances against layoffs are subject to arbitration. Its disagreement with the union only goes to the proper interpretation of Article 20. The union argues that Article 20, properly construed, forbids layoffs when there is no lack of work at the base from which the layoffs are made. The petitioner argues, to the contrary, that Article 20 applies only to the order in which layoffs are made. Resolution of that dispute is for the arbitrator.

The bargaining history of the agreement was before the District Court. Even if admissible, it does not go to the arbitrability of a layoff grievance but to the respective claims of the petitioner and the union as to the proper interpretation of Article 20.

Since there is no applicable exemption from arbitration of the union's grievance here, the District Court properly entered a judgment ordering arbitration of that grievance. It said that it did so, however, because it found that the claim that the company violated the layoff provisions of Article 20 was "arguable." That claim raised a question of interpretation of the agreement and, being so, was arbitrable whether or not deemed by a court to be "arguable." The Court of Appeals treated the District Court judgment as one directing that the arbitrator decide the arbitrability question and affirmed it, saying that when arbitrability is enmeshed with the merits it is for the arbitrator, not the court, to determine arbitrability. That was error. Arbitrators do indeed sometimes use the term "arbitrability" in deciding whether the agreement, properly construed, limits management in the way claimed by the union. "Arbitrability" in that sense is always for the arbitrator, never for the court asked to order arbitration. However, the question of whether a grievance is "arbitrable" in the sense of being adjudicable in arbitration must be determined by a court and the court must do so solely with reference to the provisions dealing with arbitration. If the union claims that management has violated a provision of the agreement, as it has here, and there is, as there is here, an arbitration provision remitting questions of interpretation of the agreement to arbitra-

tion and no specific applicable exemption, the court should order arbitration of the grievance and should never involve itself in the merits or the "arbitrability," in the arbitrator's sense of the term, of the union's claim.

These principles were announced by the Court 25 years ago in the cases which have been called the Steelworkers Trilogy. They have served the industrial relations community well and have led to continued reliance on arbitration rather than strikes or lockouts as a method of resolving disputes arising during the term of a collective bargaining agreement. Treatment of a general management functions provision as an exemption from arbitration, as petitioner here urges, would eviscerate the principles of the Steelworkers Trilogy and unsettle the expectations of thousands of unions and companies that have negotiated such management functions provisions with the understanding that they do not remove from arbitration claims that other provisions of the agreement have been violated. The judgment of the District Court, but neither its reasoning nor that of the Court of Appeals, should be affirmed.

ARGUMENT

Introduction

Since our interest in this case is not so much in the result under the agreement involved in this case as it is in the overall judicial approach to questions of arbitrability and management functions, we begin this brief, in Parts I-II of the argument, with a discussion of the respective roles of the courts and arbitrators in interpreting arbitration and management functions provisions in collective bargaining agreements. Only in Part III do we deal with the specific result, affirmance of the District Court's judgment, which we believe the Court should come to under the particular language of this agreement. In Part IV we discuss bargaining history as it applies in this case. Finally, in Part V, we deal with the unfortunate language in the opinions of both the District Court and the Court of Appeals that has shaped the question presented in this case and the apparent conflict in the circuits which, we believe, in turn led to the grant of certiorari.

I

A COURT ASKED TO ORDER ARBITRATION SHOULD ORDER IT IF THE CLAIM COMES WITHIN THE ARBITRATION PROVISIONS OF THE AGREEMENT WITHOUT REGARD TO THE MERITS OF THE CLAIM, BUT IT IS IMPORTANT TO BOTH MANAGEMENT AND UNIONS THAT SPECIFIC EXCLUSIONS FROM ARBITRATION BE HONORED BY THE COURTS.

Although we support the respondent we fully concur with the petitioner and with the *amici* supporting the petitioner, the Chamber of Commerce of the United States and the National Association of Manufacturers, as to the basic principle established by this Court that a court should not order arbitration of disputes which do not come within the arbitration agreement of the parties. The converse proposition, that a court should always order arbitration of those disputes that do come within that agreement, is equally important. These principles are important not only to employers but also, as we shall show, to unions. Although there are instances in which the parties stipulate that a particular matter may be decided by an arbitrator even if not covered by a general provision for arbitration, ordinarily arbitrators have jurisdiction only because the parties have agreed in advance to submit grievances which may arise in the future to arbitration.

Consonant with this basic approach, this Court in *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), the first of the cases which have become known as the Steelworkers Trilogy, held that, where there is a "standard" arbitration provision for the arbitration of all disputes as to the meaning, application, or compliance with the terms of a collective agreement, a court asked to enforce that agreement has no business inquiring into the merits of a union claim that the agreement has been violated. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective agreement is to be decided, not by the court asked to order arbitration but, as the parties have agreed, by the arbitrator. The national labor policy requires this result because grievance arbitration is not a substitute for judicial decision but

for the traditional method, protected by the National Labor Relations Act, for resolving disputes between management and labor—the strike or lockout. The goal of industrial peace set out in the Act is best served by giving assurance that when the parties agree to forego reliance on economic battle in favor of arbitration their expectation will be fully implemented by the courts.

It is a corollary of this basic principle that the courts should *not* compel arbitration of disputes that the agreement specifically excludes from arbitration. Here again the fact that arbitration is a substitute for the strike is crucial. Depending upon the nature of the no-strike commitment in the collective agreement an exception to the agreement to arbitrate can have two quite different consequences. If the agreement not to strike is absolute, as it is in this case and in the majority of American collective agreements,[4] a determination that a union claim is exempted from the general provision for arbitration is a determination that the management action complained of is not subject to adjudication in any forum. As the petitioner here has put it in its brief: "Any decision on arbitrability affects the merits in the sense that a holding that the dispute is not arbitrable constitutes a final rejection of the employee's grievance." (Pet. Br. 23). Where there is an exclusion from arbitration *and* an absolute no-strike commitment management gains a right which it would otherwise not have as to any excluded matter within the scope of wages, hours and working conditions—the right to be free of concerted action by the employees in support of the union's claim. The *quo* of the no-strike provision is greater than the *quid* of the arbitration provision. It is for this reason that this Court in *Steelworkers v. Warrior & Gulf*, 363 U.S. 574 (1960) (where there was an absolute no-strike provision) held that "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-3.

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[4] Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts* 77.1 (1983). The Bureau of Labor Statistics data are analyzed in Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal.L.Rev. 663, 758-759 (1973).

This situation is otherwise, however, in those collective bargaining agreements in which the agreement not to strike is coterminous with the agreement to arbitrate. There are many examples of such agreements. The contract between General Motors and the United Automobile Workers, for example, contains a lengthy and detailed provision concerning production standards. When a dispute arises as to whether the company has complied with those provisions, it is subject to the grievance procedure. The impartial umpire under that agreement, however, is specifically forbidden to rule on any dispute arising under those provisions. And the union's agreement not to strike, as well as the employer's agreement not to lock out, is expressly limited to those cases in which the umpire is empowered to rule. [5]

A similar example is provided by the agreement between the Steelworkers and the Aluminum Company of America. It contains the usual grievance procedure, the terminal point being a board of arbitration. The board's sole function is to interpret the provisions of the agreement and to decide cases of alleged violation of such provisions. Specific subjects, such as contracting out are excluded from arbitration. But the agreement then provides that the union will not strike nor cause any of its members to take part in any strike "[a]s to any disputes subject to arbitration . . .," precisely the type of prohibition against strikes which this Court in *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962) has found to be implied by an agreement to arbitrate disputes. As to other disputes the grievance procedure is available and strikes are forbidden only until five days after its exhaustion.[6]

In all of the cases in which there is a parallel exclusion from arbitration and from the no-strike obligation, a decision that a dispute is not arbitrable does not mean that management's decision or action is binding, as is the case where the no-strike obligation is absolute. A decision that the matter is not subject to

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[5] The relevant provisions of the UAW-GM agreement are reproduced in the appendix to this brief.

[6] The relevant provisions of the Alcoa agreement are reproduced in the appendix to this brief.

arbitration simply reserves the question of the propriety of management's action to the arena of industrial conflict. It is a decision that the union has the right to strike. And such a decision is a decision for the courts, not for an arbitrator, unless the parties vest the power to make such a decision in the arbitrator.

II

UNLESS OTHERWISE SPECIFICALLY PROVIDED A MANAGEMENT FUNCTIONS CLAUSE IS SUBJECT TO OTHER PROVISIONS OF AN AGREEMENT AND DOES NOT EXCLUDE FROM ARBITRATION CLAIMS OF VIOLATION OF THOSE OTHER PROVISIONS

Although, for the reasons stated, we agree that the court should respect any exclusion of a specific subject from a general arbitration provision, the use of the typical management functions provision as such an exclusion would completely undermine the holdings of this Court in the Steelworkers Trilogy. If a court looks to such a provision to determine whether a grievance is excluded from arbitration, it inevitably must enmesh itself in a decision as to the merits of the union's interpretation of other provisions of the agreement and thus enter through the back door, as it were, the domain this court has said is the arbitrator's.

This is so because a management functions clause, unless specifically otherwise provided, merely states what would be true in its absence: management has the right to act in the first instance and its actions can be found by an arbitrator to be improper only if some other provision of the agreement, express or implied, restricts management's right so to act. That is why most management functions provisions state explicitly, as does the agreement in this case, that management's exercise of its functions is "subject to the limitations contained in the provisions of this contract." (J.A. 22) Even in the absence of such an expression it is generally understood that a management functions or management rights provision is always subject to the limitations on those rights expressed elsewhere in the agreement unless the contrary is stated. As it was put by the Bureau of Labor Statistics in its study of management rights provisions: "A review of a

sample of general and enumerated statements revealed that one restriction, by far more prominent than all others, emphasized that the exercise of management's rights could not conflict with other provisions of the contract and thus underline the supremacy of specific agreement provisions which modify management's rights. This restriction, of course, is implied in all written agreements. . . ."[7] A judicial determination that a general management functions provision excludes from arbitration a claim that other provisions of the agreement have been violated would require the court to determine whether management's functions are limited by those other provisions in the way claimed by the union. And such a determination, in turn, is in fact part of the determination of the merit of the union's claim, a determination which the parties have relegated to the arbitrator.

What, then, is the purpose of inserting management functions or management rights provisions in collective bargaining agreements? They do appear in a great many.[8] Their function was well described to the Academy by a representative of the Bethlehem Steel Company:

> If management's residual functions which are neither limited nor surrendered in the collective bargaining agreement are reserved exclusively to management, the question of whether there is any point to the inclusion of the usual type of management rights provision in the contract may well be asked. If we were dealing with a commercial contract which would be interpreted in the same manner as commer-

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[7] U.S., Bureau of Labor Statistics, Bulletin No. 1425-5, *Major Collective Bargaining Agreements: Management Rights and Union-Management Cooperation* 21 (1966). The same principle is stated in Prentice-Hall, *Personnel Management: Industrial Relations* ¶ 53,310 (Looseleaf, 1978): "Some contracts state that the company shall have the power to direct the work force, without expressing any limitation. Management prerogatives are, however, always subject to the terms of the agreement even if not expressly so stated."

[8] Such provisions were found in 76% of the agreements in the sample analyzed by the Bureau of National Affairs. *Collective Bargaining Negotiations and Contracts* 65:1 (Looseleaf, 1983).

cial contracts are usually interpreted, such a provision would certainly be superfluous. Technically, it is equally superfluous in the collective bargaining agreement. It should be unnnecessary for the contracting party to insist upon including in the instrument language to the effect that, except for the obligations which he has expressly assumed therein, the agreement is not to be interpreted as placing him under any obligation to the other party.

However, there are at least two useful functions that the management rights provisions of the contract serve. First, I have noticed that even arbitrators who may subscribe to the principle that management continues to possess the residue of rights that have not been bargained away take great comfort in being able to cite or quote explicit language which states what would otherwise be implied. Secondly, and this is closely related to my first point, collective bargaining agreements are working documents to which frequent reference is made in the shop. The people who must interpret them at the shop level may not be acquainted with how contracts are construed and some of them may take strong exceptions to the common law concept of management rights. Language which clearly expresses what otherwise would be left to implication helps to avoid shop frictions and to prevent charges that the management indulges in legalistic hocus-pocus in trying to justify an act which the agreement does not mention. The arbitrator, too, is helped by the management rights language because his opinion is more convincing and obtains readier acceptance if he can support his decision by the language of the management functions section of the contract instead of relying upon the unexpressed principle that the management right which he sustained, although not mentioned in the contract negotiations, was reserved to the management.[9]

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[9] Phelps, *Management's Reserved Rights: An Industry View*, in MANAGEMENT'S RIGHTS AND THE ARBITRATION PROCESS, PROCEEDINGS OF THE 9TH ANNUAL MEETING 102, 112 (1956).

We fully concur with this view with the sole exception of the word "expressly" in the first paragraph. It is now well established both in arbitration and in this Court's decisions that a collective agreement may be found to contain implicit restrictions upon management's conduct which are not spelled out in the words of the agreement. As Archibald Cox put it in an address to the 12th Annual Meeting of the Academy reprinted in the Harvard Law Review: "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages." 72 Harv. L. Rev. 1482, 1488-89 (1959).

We do not argue, of course, that the parties cannot place a specific exclusion from arbitration in a management functions clause. Collective agreements vary enormously in their structure. The physical placement of a specific exclusion from arbitration is irrelevant. The exclusion can appear in a management functions clause. See, e.g., the management rights provision in the agreement between North American Aviation, Inc., and the UAW, reproduced in Prentice-Hall, *Union Contracts and Collective Bargaining Practice*, § 53, 320.23 (1946). It includes the following: "The right to hire, promote, transfer and discharge or discipline all levels of Supervision is strictly a management function and is not subject to the grievance procedure." But in the absence of such specific exclusion from the grievance procedure or from arbitration a general statement of management functions cannot be used as an exclusion from arbitration of claims the management, in exercising its functions, has violated that agreement.

Indeed, this Court has already decided that reliance on a management functions provision to find an exception to an arbitration provision is unwarranted. In *Warrior & Gulf* the collective agreement excluded from arbitration "matters which are strictly a function of management." The union demanded arbitration of a grievance complaining of the contracting out of work. The Court of Appeals in that case held that in order to determine whether the dispute was arbitrable the court had to

determine whether contracting out was "strictly a function of management." This Court, reversing, held that so to construe the exclusion would permit "the arbitration clause [to] be swallowed up by the exception." 363 U.S. at 584.

III

THERE IS NO PROVISION EXEMPTING LAYOFF GRIEVANCES FROM THE ARBITRATION PROVISION OF THIS AGREEMENT. THE DISTRICT COURT'S JUDGMENT SHOULD THEREFORE BE AFFIRMED.

It remains to apply these general principles to the particular facts of this case. We begin, as we must, with the grievance. The union claimed that the company violated Article 20 of the agreement by laying off employees from its Chicago base when there was no lack of work at that base. If a claim of violation of Article 20 is encompassed within the arbitration provisions of the agreement and is not elsewhere excluded a court should order arbitration of that claim whether or not it is arguable and, indeed, even if the court believes the claim to be a frivolous one.

We must, then, first turn to the arbitration provision of the agreement. That provision, Article 8, says that any differences with respect to the performance of any obligation under the agreement shall be referred upon written demand to an impartial arbitrator if the grievance procedures have been exhausted, as they have been here. It does contain a parenthetical exception. That exception is that arbitration can be had only if "such dispute is not excluded from arbitration by *other* provisions of this contract." (J.A. 21, emphasis added.) That exception requires us, therefore, to search the agreement for provisions excluding disputes from arbitration.

The petitioner finds such an exclusion in the management functions provision of Article 9. Article 9 recognizes the right of the company to exercise the functions of managing the business. Those functions involve, among other things, the termination of employment. But that right is expressly made "subject to the limitations contained in the provisions of this contract." It therefore corresponds exactly to the usual meaning of a management

functions clause. There is, however, also an exception in Article 9. The exercise of management functions is subject to the limitations contained in the agreement except as to matters "otherwise not subject to the provisions of the arbitration clause." (J.A. 22) This adds nothing and simply confirms what would be true in any case. If a union claim that management, in exercising its function of running the business, has violated the agreement but the agreement exempts that claim from arbitration, the management's decision is final if the agreement contains an absolute no-strike clause.

The exception in Article 9, therefore, does not tell us what is excluded from arbitration. It is simply a cross reference to any exclusion of grievances from arbitration that may be found elsewhere in the agreement.

It was undoubtedly inserted into the agreement, along with the exception in Article 8, because in this agreement, as in other agreements of the Bell system, grievances against certain kinds of discipline cannot be taken to arbitration.[10] This limitation on

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[10] The agreements of the operating companies which were, until the recent divestiture, subsidiaries of A.T.&T. (as is the petitioner in this case) exhibit a common pattern of excluding from arbitration grievances against certain disciplinary action although the placement of those exclusions varies. We do not have access to a file of Bell system agreements, but a sufficient number of arbitration decisions involving Bell system companies have been published by the Bureau of National Affairs in Labor Arbitration Reports (cited herein as "LA") to make the pattern clear. Thus, in the Southwestern Bell agreement in effect in 1964, the arbitration article excluded from arbitration dismissals of employees with less than three years of service. See *Southwestern Bell Telephone Co.*, 45 LA 229, 230 (1965). By 1971 the required period of service had been reduced to one year while the exclusion remained in the arbitration article. See *Southwestern Bell Telephone Co.*, 61 LA 202, 207 (1973). At Southern Bell in 1974 a similar limitation in discharge cases, in that instance six months, was contained in the article dealing with "Discharges and Demotions." *Southern Bell Telephone Co.*, 65 LA 1314 (1976). Demotion grievances in the same agreement could be filed by any employee but were arbitrable, under the "Discharges and Demotions" article, only if the employee had three months of service.

arbitration is contained in Article 22 of the agreement. Article 22 deals with certain kinds of terminations: "DISCIPLINARY SUSPENSION, OR TERMINATION OF EMPLOYMENT—RELIEVED, DROPPED OR DISCHARGED. (J.A. 24) In such cases the union may question in the grievance procedure the justification of management's action in suspending or terminating an employee. But it provides that "any such question with respect to an Employee having a Term of Employment of six (6) months or less, which is not settled with the immediate Supervisor of the Employee involved may be taken up with the Area Supervisor, but this shall be considered the final level of discussion of any such grievance." An employee with less than six months of service who is suspended, relieved, dropped or discharged can, therefore, file a grievance but cannot take that grievance to arbitration.

It is this kind of limitation to which the exceptions in Article 8 and Article 9 refer. But the limitation on arbitration contained in Article 22 is not applicable to a grievance complaining of a layoff. It applies by its terms only to disciplinary suspensions and those terminations which are classified as "Relieved, Dropped or Discharged."

Paragraph 1.11 of the agreement does define "layoff" as a termination but paragraph 1.5 of the same article makes it crystal clear that Article 22 does not apply to that kind of termination. Paragraph 1.5 provides, in relevant part:

> 1.5 For the purpose of adjusting grievances of Employees who, at the time of the grievance, were represented by

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See *Southern Bell*, 55 LA 1206 (1970). At Pacific Telephone the limitation in discharge cases (three years in 1964) is contained in the article entitled "Dismissals." See *Pacific Telephone and Telegraph Co.*, 45 LA 655 (1965). The period was reduced to two years by 1966, see *Pacific Telephone and Telegraph Co.*, 45 LA 121 (1967) and to six months by 1974, see *Pacific Telephone and Telegraph Co.*, 66 LA 433 (1976), but remained in the dismissal article. See also *South Central Bell Telephone Co.*, 80 LA 891 (1983) (arbitration of discharges and demotions only if employee has six months of service, in "Discharges and Demotions" article). See also the litigation at Pacific Northwest Bell discussed in Part IV of this brief.

> the Union, the Company shall recognize the Union as representing:
>
> 1.51 Employee . . . *Laid-Off.* suspended for disciplinary reasons, dropped, relieved or discharged, provided the grievance is presented to the Company by the Local within thirty (30) days after the Employee is . . . separated from the payroll, except that where the justification of the action is involved in disciplinary suspension, relieved, dropped or discharged cases, the provisions of Article 22, Disciplinary Suspension, or Termination of Employment-Relieved, Dropped or Discharged, will apply. (J.A. 21 emphasis added).

By the express terms of the agreement, therefore, the limitations on arbitration contained in Article 22 are not applicable to a grievance complaining that a layoff violates the agreements.

The petitioner has indeed conceded throughout that the question whether a layoff complies with the provisions of Article 20 is arbitrable. Its contention has been that Article 20 deals only with the order in which employees are to be laid off rather than, as the union contends, whether there is lack of work at the particular base, and it has agreed that a claim that layoffs were not made in the order specified by Article 20 would be subject to arbitration. Its argument has been, simply, that Article 20 should not be construed in the way claimed by the union. That question is clearly one for the arbitrator.

Even were this not so, it is at least true that the provisions of this agreement regarding exclusion from arbitration are ambiguous, and this contract contains an absolute no-strike clause. This Court has declared, in *Warrior & Gulf*, that where there is doubt as to whether a particular grievance is encompassed within the arbitration provision it should be resolved in favor of ordering arbitration. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-583. Given this principle, which we fully endorse, the judgment of the District Court "that defendant arbitrate the grievance"(Pet.App. 12A) should be affirmed even

though, as we demonstrate in Part V below, neither the reasons for its order given by the District Court nor the opinion of the Court of Appeals correctly stated the applicable legal principles.

IV

THE BARGAINING HISTORY RELIED ON BY PETITIONER IS IRRELEVANT

The petitioner argues (Pet.Br. pp. 17-20) that a court, in determining the meaning of an exclusion of particular disputes from arbitration should consider all evidence, including bargaining history. It is not at all clear that this proposition is correct[11] but, assuming it to be so, it is irrelevant because the bargaining history relied upon does not relate to any specific exclusion from arbitration. This is shown most dramatically by detailed examination of the Pacific Northwest Bell Telephone case relied upon by the petitioner (Pet.Br. 18) and by the *amici* supporting it (NAM Br. 7, Chamber of Commerce Br. 13), a case involving an agreement whose structure was remarkably similar to the structure of the agreement in this case.

In *Pacific Northwest Bell Telephone Co. v. Communications Workers*, 310 F.2d 244 (1962), the Court of Appeals for the Ninth Circuit held that in ascertaining the extent of the parties' agreement to submit to arbitration it was error for the lower court to exclude testimony as to the bargaining history of the provisions regarding arbitration. The case then went back to the District Court. That court concluded, on the basis of the testimony, that disciplinary suspensions were not subject to arbitration. The District Court's determination was affirmed by the Ninth Circuit. *Communication Workers v. Pacific Northwest Bell Telephone Co.*, 337 F.2d 455 (1964).

The District Court's decision on remand is not reported, but its findings are set forth in great detail in the affirmance by the Ninth Circuit. As detailed in those findings, the union had proposed in

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[11] Although sensible argument can be made for the admissibility of bargaining history, the opportunity offered for delay, such as has occurred here, in what should be a speedy and efficient process argues in the opposite direction.

negotiations that all cases of discipline and discharge should be subject to arbitration. The employer rejected this proposal but finally offered to include in arbitration, under certain conditions, discharges of employees with more than five years of service. Although at first rejected, this proposal was finally agreed upon. In the following year the parties agreed to reduce to two the number of years of service required for an employee's dismissal to be subject to arbitration.

In the light of this bargaining history the District Court concluded, and the Ninth Circuit agreed, that disciplinary suspensions, which the union had specifically requested be included within the provisions regarding termination of employment, were not subject to arbitration.

What is instructive about this litigation is its similarity to the issues presented in this case. The agreement involved in the Pacific Northwest Telephone case had a grievance procedure and a general arbitration clause. It also contained a separate article dealing with dismissals comparable to Article 22 in this case. It was the bargaining history of that article which the court found persuasive in determining that suspensions were not subject to arbitration. There was no reference to a management functions clause. The relevant bargaining history was the history of the clause specifically dealing with dismissals. As we have shown, the comparable provision in this agreement excluding certain grievances from arbitration, Article 22, is inapplicable to layoffs and the bargaining history relied on by petitioner does not claim that it is.

The 1952 New York decision relied on by the petitioner is similarly irrelevant. That decision concerned the arbitrability of discharge cases, not layoffs, under the then existing contract. That question is now covered explicitly by Article 22. And, in any event, the New York court's decision as to arbitrability was merely an application of the *Cutler-Hammer* doctrine which this Court in 1960 in the *American Manufacturing* case explicitly held to be inapplicable in suits brought under Section 301. The only case cited by the Supreme Court of New York for its decision that the union's claim was "untenable," affirmed by the Court of Appeals without citation was, indeed, the *Cutler-Hammer* case.

(The Supreme Court of New York's decision is reported in Labor Arbitration Reports, *In re Western Electric Co.*, 17 LA 193 (1951)).

V

BOTH COURTS BELOW USED THE WRONG STANDARD IN DETERMINING "ARBITRABILITY." IT WAS THAT ERROR WHICH CAUSED THE COURT OF APPEALS TO CREATE AN UNNECESSARY EXCEPTION TO THE RULE THAT "ARBITRABILITY" IS TO BE DETERMINED BY THE COURT.

The Court of Appeals, in affirming the judgment of the District Court, said that there was an exception to the principle that arbitrability must be decided by a court asked to order arbitration. That exception it said applied "where arbitrability would entangle a court in the construction of substantive provisions of a labor agreement." (Pet.App. 4A). This was, we concede, an error, but one occasioned by confusion between two meanings of the term "arbitrability," confusion induced by the way the District Court determined arbitrability.

As the District Court saw the case and, indeed, as the employer pled the case,[12] the issue was whether Article 20 of the agreement constituted the kind of limitation on the management functions clause that the union contended for. Finding the union's interpretation of Article 20 to be at least "arguable," the District Court decided to order arbitration. (Pet.App. 11A). The judgment it issued, "[t]hat defendant arbitrate the grievance" (Pet.App. 12A) was correct but the reasoning in its "order" was erroneous. Neither Articles 8 or 9 contained in themselves any exclusion from arbitration of the question of the proper interpretation of Article 20. That question was, and is, a question for the arbitrator, whether "arguable" or not.

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[12] The employer's answer to the allegation that it had refused to arbitrate was that "its conduct has not, in any way, violated the collective bargaining agreement." J.A. 16.

Seizing upon the issue as seen by the District Court, the Court of Appeals interpreted the District Court's order as ordering arbitration of the "arbitrability" issue. It then concluded that since resolution of that issue would "enmesh a court in the merits of this dispute" an exception to the usual rule that a court determine arbitrability was necessary. (Pet.App. 8A). This compounded the District Court's error. Once it is recognized that the "arbitrability" of a union grievance is to be determined solely by the terms of the arbitration clause and any specific exceptions to it, not by interpretation of the provision which the union claims limits management's rights, there is no need for any such exception.

What perhaps explains the Court of Appeal's error is the fact that the word "arbitrability" has at least two quite different meanings. As Archibald Cox has put it, " 'arbitrability,' like its twin 'jurisdiction,' covers several concepts [and] we tend to slide unconsciously from one to the other."[13]

"Arbitrability" in the sense of justiciability in arbitration is a question for a court asked to order arbitration, not an arbitrator, unless the parties provide otherwise. There is, however, another sense in which the term is used, frequently by arbitrators. When a grievance is filed complaining that management has not complied with a collective agreement there is often a question whether there is any provision in the agreement, express or implied, limiting management's right to run the business in the way claimed by the grievance. If there is not, or if the claimed provision is not applicable, the dispute is in a sense not "arbitrable."

This use of the term "arbitrable" is most easily seen in cases in which the claimed limitation on management's discretion is an implied one. Suppose, for example, a grievance is filed complaining that an employee's discharge is not for just cause. The agreement contains a "standard" arbitration clause but has no express language limiting the employer's right to discharge employees. If the employer refuses to arbitrate, the "arbitrability"

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[13] Cox, *op. cit. supra* n. 1 at 54, 72 Harv. L. Rev. 1482 at 1507.

question to be decided by a court asked to order arbitration is whether the union's claim is based on a contention that the agreement, properly construed, contains an implicit limitation on the employer's right to discharge. If so, the grievance is arbitrable in the sense that the claim is justiciable in arbitration unless specifically excluded. But when the arbitration occurs, there is a second "arbitrability" question: whether, looking at the agreement as a whole, there is implicit in it a just cause limitation on the employer's right to discharge. That is a question for the arbitrator. If the arbitrator decides that there is not, then the question on the merits—whether there was just cause for discharge in the particular case—is not "arbitrable" and management's right to manage the business is not limited by any provision of the agreement.

The different meanings of "arbitrability" are roughly analogous to the different meanings of "jurisdiction," a word which petitioner repeatedly uses in its brief. (Pet.Br. pp. 10, 15) Thus, Section 4 of the Norris-LaGuardia Act says that "no court of the United States shall have *jurisdiction*" to enjoin a strike. 29 U.S.C. § 104, emphasis added. But this Court in *Avco Corporation v. Aero Lodge 735, IAM,* 390 U.S. 557 (1968) nevertheless held that the federal district court had "jurisdiction" of a suit to enjoin a strike in violation of a collective bargaining agreement even though, as the law stood at that time, it could not grant the relief sought. Just so, a dispute may be "arbitrable" in the sense that it is adjudicable in arbitration but not "arbitrable" in the arbitrator's sense because there is no restriction of the kind claimed by the union in the agreement.[14]

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[14] It is this second sense of the term "arbitrability" that explains this Court's footnote 8 in *Nolde Bros. v. Bakery Workers,* 430 U.S. 243, 255 (1977), upon which the Court of Appeals relied, reserving the question of "the arbitrator's authority to consider arbitrability following removal." An arbitrator who decides that a dispute is not "arbitrable" in this second sense does not "decide . . . contrary to the court . . . " as petitioner would have it. (Pet.Br. p. 14). An arbitrator has no authority to overrule a decision of this Court that he is to interpret the contract. He can only decide that, properly interpreted, the contract does not limit management's action in the way claimed by the union and that therefore the dispute is not "arbitrable" in the second sense. It explains also the

The difference can be illustrated by examining three arbitration cases. The first is *New Hotel Showboat,* 48 LA 240 (Edgar A. Jones, 1967). In that case an employee was discharged and the union filed a grievance claiming the discharge was in violation of the agreement because not for just cause. The agreement had no provision limiting discharges to those for cause. If the employer had resisted arbitration of the claim a court, following the principles of *Warrior & Gulf,* would order arbitration. Before the arbitrator the employer could nonetheless argue, as the employer did, that the dispute was not arbitrable because there was no limitation in the agreement on the employer's right to discharge. The arbitrator found that, viewing the agreement as a whole, it did contain an implicit just cause limitation. He therefore held that the claim was "subject to arbitration" and set the matter for hearing on whether the employer had violated the standard which he had found implicit in the agreement. He was equally free, as arbitrators in other cases have been, to decide that there was no limitation on the employer's right to take the complained of action and the dispute was not therefore "arbitrable" in the second sense. The fact that a court in such a case would have found the dispute to be "arbitrable," i.e., to be decided by an arbitrator, would not preclude the arbitrator from finding that the dispute was not "arbitrable" in the sense that there was no limitation in the agreement of the kind claimed by the union in the particular grievance.

A second case illustrating the two different meanings of "arbitrability" involves the petitioner in this case. In *Western Electric Co.,* 46 LA 1018 (Frank J. Dugan, 1966), the union claimed that the employer improperly combined classifications in violation of

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statement in this Court's opinion in *W.R. Grace & Co. v. Rubber Workers Local 795,* 461 U.S. 757, 765 (1983) that "because the authority of arbitrators is a subject of the collective bargining, just as any other contractual provision, the scope of the arbitrator's authority [e.g., "arbitrability"] is itself a question of contract interpretation that the parties have delegated to the arbitrator." The authority of the arbitrator there referred to was the authority to decide whether an earlier arbitration had a preclusive effect so as to make decision of the same question decided in the earlier arbitration not "arbitrable."

the agreements. The employer argued that the issue was not arbitrable because the union's claim was contrary to the express provisions of the agreement. The arbitrator sustained the company's defense and held that "the specific issue raised in the grievance is not arbitrable." Explaining his decision he said:

> Finally, as to the Union's contention that the Supreme Court's decision in Warrior, supra, and related cases requires a holding of arbitrability unless the party urging nonarbitrability proves it beyond a shadow of a doubt, an analysis of decisions relied upon by the Union show that they involved the approach that a court must have in approaching the problem of arbitrability. They did not involve the approach of an arbitrator in deciding questions of arbitrability. 48 LA at 1021.

A final illustrative case is the arbitrator's decision in the *Warrior & Gulf* case itself. This Court had held that the union's grievance against contracting out was "arbitrable" in the sense that it was adjudicable in arbitration. When the grievance was heard by the arbitrator, the union contended that the arbitrability question had already been decided. The arbitrator rejected that contention but, after examining the collective bargaining history, found that the parties had agreed that there was an implicit limit on some kinds of contracting out and that the grievance was therefore "arbitrable." He then proceeded to decide whethe. 'hat limitation forbade the contracting out complained of by the union and concluded, on the merits, that some but not all of the union's claim should be sustained. *Warrior & Gulf Navigation Co.*, 36 LA 695 (Holly, 1961).

It is this second sense of the term "arbitrability" that the court below may have used in ordering "the Company . . . to arbitrate the arbitrability issue." (Pet.App. 8A) Petitioner's claim in the Court of Appeals was, as it is here, that Article 20 does not limit management's rights in the way claimed by the union. That is an "arbitrability" question in the second sense we have described and is, indeed, for the arbitrator.[15] It is not an "arbitrability" question

[15] There is one situation, not presented in this case, in which arbitrability in the second sense must be considered by a court. In *Boys*

in the sense of justiciability in arbitration. That question depends, as we have argued, on the proper interpretation not of the management functions clause but of the arbitration provision and any specific exclusions from arbitration contained either in it or elsewhere in the agreement.

A dispute is arbitrable, i.e., adjudicable in arbitration, if it comes within the arbitration provision of the agreement, just as a suit for breach of a collective agreement is within a court's jurisdiction under Section 301. If the dispute is arbitrable in that sense, the first step in the arbitrator's determination may be a decision as to whether management's rights are limited in the way claimed by the union, just as a court, having jurisdiction in a 301 suit, must decide whether it has jurisdiction to enjoin a strike. In this case the dispute is clearly adjudicable in arbitration because it is covered by the general arbitration provision and there is no

Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970), this Court held that a proper accommodation of Section 301 and the Norris-LaGuardia Act made available to employers the remedy of an injunction against a strike in violation of a no-strike clause if, but only if, the strike was "over an arbitrable grievance." 398 U.S. at 254. If by "arbitrable" this Court meant subject to adjudication by an arbitrator under *Warrior & Gulf* principles, this standard could permit an employer to obtain an injunction against any strike on the theory that it is conceivable that the union could file a frivolous, but nevertheless "arbitrable" grievance, against the employer conduct giving rise to the strike even though that conduct was not governed by the agreement. Clearly this is not what was intended as is shown by this Court's decision in *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). On the other hand, reading the term "arbitrable" as meaning in fact governed by the agreement would require the court, in determining whether an injunction was permissible, to invade what is clearly the arbitrator's function. One solution to this dilemma is to apply an "arguably arbitrable" test in the second, or arbitrator's, sense in injunction cases. See Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 35 Harv. L. Rev. 636 (1972) Cf. *Southwestern Bell Telephone Co. v. CWA*, 454 F.2d 1333 (5th Cir. 1972). Thus the test erroneously applied by the District Court in this case in order to determine whether arbitration should be ordered would, indeed, be the appropriate test if, instead of filing a grievance, the union in this case went out on strike and the employer sought an injunction.

applicable exclusion. When the dispute goes to arbitration, the arbitrator will first have to decide whether the union's claim as to the meaning of Article 20 is correct. If he determines that it is, i.e., that management may not lay off employees at a particular base where there is no lack of work at that base ("arbitrability" in the second sense we have described), he will then have to decide whether in this particular case there was or was not a lack of work at the Chicago base.

CONCLUSION

The exception which the Court of Appeal found it necessary to fashion for a case in which the question of "arbitrability" is enmeshed with the merits is not only unnecessary but potentially dangerous. It is directly attributable to that court's failure, to recognize that any claim that management, in the exercise of its function of running the business, has violated the agreement is arbitrable, whatever its merits, if the agreement contains a clause providing for the arbitration of questions of interpretation of the agreement and there is no specific exclusion. Management functions or managment rights provisions are contained in most collective bargaining agreements. To find in them, as petitioner argues, a restriction on arbitration would completely eviscerate the principles established by this Court 25 years ago in the Steelworkers Trilogy. Those principles have served the interests of the industrial relations community. They have equally served the purpose of the National Labor Relations Act by inducing unions and companies to maintain their reliance on arbitration as a substitute for industrial strife in settling disputes over interpretation and application of collective bargaining agreements. Obstruction of the enforcement of arbitration by litigious contentions based on a management functions clause, such as have been made here, can only serve as an inducement to revert to that older and more traditional method of resolution.

The principles of the Trilogy should be reaffirmed and it should be made clear that although "arbitrability" in the sense of justiciability in arbitration is a decision to be made by a court, "arbitrability" in the sense of the determination whether management functions are limited by other provisions of the agreement in the way claimed by the union is for the arbitrator and not for the court, whether or not the union's claim is thought by the court to be arguable. This Court should remand to the Court of Appeals with direction that the judgment of the District Court be affirmed, while making it clear that the reasons advanced for that judgment both in the District Court and in the Court of Appeals were in error.

Respectfully submitted,

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APPENDIX

Excerpts From the Agreement Between General Motors Corporation and the UAW (September 21, 1984)

PRODUCTION STANDARDS

(78) Production standards shall be established on the basis of fairness and equity consistent with the quality of workmanship, efficiency of operations, and the reasonable working capacities of normal operators. The Local Management of each plant has full authority to settle such matters.

(78a) Model mix shall be taken into account in establishing and/or changing production standards on car, body or truck line assembly operations. The speed of such assembly lines will not be increased beyond the level for which they are manned for the purpose of gaining additional production or for the purpose of making up for loss of production due to breakdowns or unscheduled line gaps or stops.

(78b) Work assignments on conveyor lines will be made in accordance with line speeds and available work space and the expected normal ratio of model mix and optional equipment. When it is necessary to adjust the normal scheduled mix on conveyor lines which results in more or less work being required, compensating adjustments in work assignment, manpower, spacing of units, line speed or any combination thereof will be made. Arrangements will be made locally to establish procedures which will provide advance knowledge of mix changes that require compensating adjustments so that such adjustments will be made in a timely manner. On conveyor line operations, Management will designate specific off-line operations from which manpower will be made available to compensate for such mix changes when one of the compensating adjustments requires an increase in manpower and in such case the assignment of manpower will be given priority over the off-line operation. Upon request, Management will advise the Union of the arrangements made.

(78c) After the time or the requirements for a normal operator to perform an element has been established on a car, body or

truck line assembly operation and the element is subsequently changed because of engineering changes, a change in method, machinery, equipment, layout or tools, only the time or the requirements of the elements affected by such change will be adjusted.

(78d) If a standard is to be established on a new off-line or machine operation and has not been established when the operation is placed in production, the operator will be advised of the reason for not establishing the standard and the expected requirements of the operation.

GRIEVANCE PROCEDURE

Powers of the Umpire

(46) . . . . The Umpire shall have no power to add to or subtract from or modify any of the terms of this Agreement or any agreements made supplementary hereto; nor to establish or change any wage; nor to rule on any dispute arising under Paragraphs (78) through (78d), (79g) or (79i) regarding Production Standards;

STRIKES, STOPPAGES AND LOCKOUTS

(117) . . . . The Union will not cause or permit its members to cause nor will any member of the Union take part in any strike or stoppage of any of the Corporation's operations or picket any of the Corporation's plants or premises until all the bargaining procedure as outlined in this Agreement has been exhausted, and in no case on which the Umpire shall have ruled, and in no other case on which the Umpire is not empowered to rule until after negotiations have continued for at least five days at the third step of the Grievance Procedure and not even then unless authorized by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and written notice of such intention to authorize has been delivered to the Industrial Relations Staff of the Corporation at least five (5) working days prior to such authorization.

Excerpts From the Agreement Between Aluminum Company of America and United Steelworkers of America (May 30, 1985)

Section 50. Jurisdiction of the Board

A. The Board shall regard the provisions of this Agreement as the basic principles and fundamental law governing the relationship of the parties. The Board's function is to interpret the provisions of the Agreement and to decide cases of alleged violation of such provisions. The Board shall not supplement, enlarge, diminish, or alter the scope or meaning of the Agreement as it exists from time to time, or any provisions therein nor entertain jurisdiction of any subject matter not covered thereby (except to the extent necessary to determine its jurisdiction). Without limiting the foregoing, the subjects of wages, production standards, and contracting out except as specifically provided in the letter regarding the notification procedure are by this Section excluded from arbitration . . . .

Section 53. Agreement Against Strikes or Lockouts

As to any disputes subject to arbitration, the Union agrees that it will not cause nor will its members take part in any strike or work stoppage, and the Company agrees that it will not cause any lockout.

As to any dispute not subject to arbitration, no strike, work stoppage, or lockout will be caused or sanctioned until negotiations have continued for at least five (5) days at the final step of the bargaining procedure described in Article XIV. Thereafter any strike which occurs under such circumstances shall not be deemed to be a violation of this Agreement, which shall continue to remain in full force notwithstanding such strike.